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CONSTITUTIONAL HISTORY
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CONSTITUTIONAL HISTORY
OF THE
FIRST BRITISH EMPIRE

BY

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OXFORD
AT THE CLARENDON PRESS
1930

OXFORD UNIVERSITY PRESS
AMEN HOUSE, E.C. 4
LONDON EDINBURGH GLASGOW
LEIPZIG NEW YORK TORONTO
MELBOURNE CAPETOWN BOMBAY
CALCUTTA MADRAS SHANGHAI
HUMPHREY MILFORD
PUBLISHER TO THE
UNIVERSITY

Printed in Great Britain

PREFACE

THIS work has been evoked by a practical need. When lecturing on the Constitution of the British Empire I have experienced the inconvenience arising from the absence of any text-book dealing with the constitutional history of the British Empire from its origin to the loss of the American colonies in sufficient detail to serve as an introduction to the study of the revival and development of British colonial policy. With this end in view I have concentrated on tracing the evolution of relations between the executive and the legislature and of constitutional law, and the development of Imperial control, passing by minutiae of fiscal, judicial, and military organization. On practical grounds I have referred whenever possible to the extracts from the colonial records contained in the Acts of the Privy Council and the Calendars of State Papers rather than to the often fuller and more complete information contained in the volumes of American Colonial Archives, which will seldom be available to those for whom this work is written. Considerations of space have necessitated the omission, in dealing with the events which led to the revolution, of issues of an economic character or resting on English party politics, so as to leave room for an exposition of the constitutional doctrines adduced by the contending parties and of recent discussion on these points.

The modern school of American Colonial History is marked by painstaking and accurate research, a lively interest in institutional history, and a sympathetic appreciation of the problems and difficulties of the colonists and the Imperial government alike. A list of the more important sources easily available has been appended, and I desire to express special obligation to the works of Adams, Andrews, Channing, Dickerson, Greene, McIlwain, Root, Russell, Washburne, Hazeltine, Kellogg, Egerton, Beer, and, last but not least, Osgood. For criticism and much other help I am indebted to my wife.

A. B. K.

THE UNIVERSITY OF EDINBURGH,
January 1930.

222707

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ABBREVIATIONS

A.P.C.	*Acts of the Privy Council, Colonial Series.*
C.C.	*Calendar of State Papers, Colonial*, 1574–1660. *Calendar of State Papers, American and West Indies*, 1661–8, &c.
Chalmers.	*Opinions of Eminent Lawyers on various Points of English Jurisprudence chiefly concerning the Colonies, Fisheries and Commerce of Great Britain.* London, 1814.
J.C.T.P.	*Journal of the Commissioners for Trade and Plantations.*
Macdonald.	*Select Charters illustrative of American History*, 1606–1775. New York, 1899.
Morison.	*Sources and Documents illustrating the American Revolution, 1764–88, and the Formation of the Federal Constitution.* Oxford, 1923.
Osgood.	*The American Colonies in the Eighteenth Century.* New York, 1924–5.
Parl. Hist.	*The Parliamentary History of England from the earliest Period to the Year 1803.* London, 1806–20.
Stock.	*Proceedings and Debates of the British Parliament respecting North America.* Washington, 1924–7.
St. Tr.	*A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanours from the earliest Period to the Present Time.* London, 1809–28.

PART I

THE EVOLUTION OF THE IMPERIAL CONSTITUTION

I. THE DEVELOPMENT OF IMPERIAL CONSTITUTIONAL LAW

1. *Prerogative and Parliament*

THE doctrines of colonial constitutional law were, as was natural, only slowly and tentatively formulated by the courts. But from the first one principle was applied in practice, the doctrine that settlers carried with them the right to English law. This followed easily from the forms in which settlements were first authorized by the Crown. The model of the fief appealed to Elizabeth and was also favoured by the Stuarts, but it had a rival in the trading corporation. In either case the foundation of the system must clearly be the law of England. The sovereign could not be expected to seek to confer on a subject authority to disregard that law, nor would settlers have been forthcoming to be subject to the arbitrary rule of a proprietor, while the trading company was essentially a creation of English law. Hence in the early charters and proprietary grants it is assumed that the laws of England in some sense are carried into the settlements, and the rule is laid down that legislation under the powers conferred by the grants shall not run counter to the laws of England. The doctrine appears in the grant to Sir Humphrey Gilbert in 1578, in the East India Company's Charter of 1600, in the Virginia Charters of 1606–12, and its insertion is universal throughout colonial history.

The right of the Crown to make proprietary grants, and to establish companies for overseas exploitation and settlement, rested on the prerogative, and the prerogative could hardly be challenged. Oversea enterprise was demanded by the conditions of the times. Spanish success in winning and working gold and silver mines inspired the desire to acquire like sources of national wealth; the economic effect of the influx of increased quantities of specie impelled the development of manufacture of woollen goods and their export, while the movement to form enclosures, stimulated by the need of increasing the output of wool, promoted the effort to discover fresh fields of employment for a population which seemed surplus to domestic requirements. The dangers of dependence on the Baltic countries for naval stores impelled the search for new sources of supply, and ignorance of the scanty numbers and backward state of the Indian tribes of America rendered it possible to hope for an important market for English manufactures there. Moreover, the delusive hope of finding access to the eastern shores of Asia long persisted even after the East India Co. had been established to open up communications with western India. For the work of seeking to colonize distant and almost unknown lands the government of England had no resources to spare; it must fall back on the enterprise of individuals and companies, and nothing was more natural than that the prerogative of the Crown should be looked to as affording the natural mode of exercising control, for the prerogative was rooted in the requisities of public advantage.

But, while the control of foreign relations and the establishment of oversea governments naturally fell to the Crown in virtue of the prerogative, the position of Parliament could not be one of indifference. The actual setting up of colonial constitutions was indeed a matter which Parliament was not anxious to undertake, and the tradition of leaving these issues to royal control persisted, as it has to the present day, and Walpole was fully justified in preferring to provide for the establishment of Georgia by the prerogative rather than by Act of Parliament. On the other hand, the right of Parliament to legislate to control the actions of English subjects and English corporations could not ultimately be denied, nor were there lacking instances of the passing of legislation by Parliament for possessions beyond the realm itself. The statutes of Elizabeth for the establishment of the English Church, and the security of the Crown against the Papacy and the Jesuits, referred to the dominions, and similarly wide terms were employed in the legislation evoked by the Gunpowder Plot. Thus Elizabeth's Act of Supremacy, 1559 (c. i), refers to 'the putting away of all usurped and foreign powers and authorities out of this your realm and other your highness's dominions and countries'. Nor had the control of companies intended to transact business outside the realm been left untouched by Parliament. The Russia Company, incorporated by charter of Philip and Mary in 1553–4, secured from Parliament in 1566 incorporation as the fellowship of English merchants for discovery of new trade with a monopoly of trade in Russia, Armenia, Persia, and the Caspian Sea. In December

1584 the Commons passed a bill to confirm the patent of Sir W. Raleigh, but the Lords did not proceed with it.[1] It was, however, entirely in keeping with the determination of James I to assert the prerogative and to dispense with the intervention of a Parliament which, unlike Elizabeth, he could not control that strong objection was manifested by the Crown to the intervention in colonial matters of Parliament. But Parliament was by no means willing to be ignored, though in fact its activity had comparatively little effect under James I. In 1614 an appeal was made by the Virginia Company to Parliament for an Act for the better plantation of the colony, but the appearance of Martyn for the company did not produce legislation.[2] In 1621 James agreed to consider the granting of a new patent to the company and even to allow it to be confirmed by Parliament, though this project never matured. On the other hand, Parliament busied itself that year with various complaints on colonial issues; a complaint as to the tobacco monopoly was considered by the Commons, and a measure agreed to for the exclusion of Spanish tobacco. Far more important was the attitude of the Commons to a bill which was introduced to defeat the monopolistic provisions of the New England Company's charter of 1620 and to declare open the fishing from Newfoundland to Virginia. The Secretary of State roundly denied the competence of Parliament 'to make any laws here for those countries which are not as yet annexed to the Crown', and asseverated that 'this bill was not proper for this house because it concerneth America'. The answer made was complete: Parliament could legally 'make laws here for Virginia; for, if the King give consent to this bill, passed here and by the Lords, this will controul the patent'.[3] But the King's influence was sufficient to prevent the Lords allowing further progress to be made. The issue of monopoly, however, was not allowed to rest, and the claims of the Virginia Company and the terms of the New England patent were frequently canvassed, though the Act of 1624 against monopolies was restricted to dealing with trade and production within the realm, and efforts then and down to 1628 to secure legislation against the fishery monopoly failed to be accepted by the Lords. In 1624 the Virginia Company, whose charter was menaced by the hostility of the Crown, appealed to the House of Commons, which reluctantly entered into a consideration of its grievances. James, however, wrote to the Speaker that the matter should be dropped, because the Privy Council had it in hand, and, as Nethersole records, the order of James was assented to in general silence, but not without whispers that by such means any business might be taken out of the hands of Parliament.[1] This was, of course, by no means the end of efforts to obtain Parliamentary intervention, and in 1629 a Bill was introduced into the House of Commons to confirm the Bermuda charter of 1615.[2]

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[1] Stock, i. 5.

[2] Ibid., i. 20–4.

[3] *Commons Journal*, i. 481, 487–9, 591, 626; Stock, i. 36 ff.

Parliament, however, necessarily asserted its authority when during the civil war it usurped the executive power and claimed the right to legislate without the royal assent. The ordinance of 1643 providing for the appointment of a commission of six peers and twelve commoners under the Earl of Warwick to control the affairs of the colonies conferred on the commission not merely the power to appoint and remove Governors, Councillors, and other officials, but also to transfer part of their authority to officials chosen by proprietors or by the inhabitants, thus conferring on them important political powers. Far more decisive was the Act of 19 May 1649[3] establishing the Commonwealth which declared 'that the people of England and of all the dominions and territories thereunto belonging are and shall be and are hereby constituted, made, established, and confirmed to be a Commonwealth and Free State; and shall from henceforth be governed as a Commonwealth and Free State by the supreme authority of this nation, the representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them for the good of the people, and that without any King or House of Lords'. The subordination of the oversea territories to Parliament thus formally expressed was carried farther on 3 October 1650[4] when in the Act to prohibit trade with the insurgent territories of Virginia, Bermuda, Barbados, and Antigua, these lands were referred to as 'colonies and plantations, which were planted at the cost and settled by the people and by authority of this nation, which are and ought to be subordinate to and dependent upon

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[1] Cal. Dom. 1623–5, p. 227; Stock, i. 68.

[2] Stock, i. 96.

[3] Firth and Rait, *Acts and Ordinances*, ii. 122.

[4] Ibid., ii. 425.

England; and hath ever since the planting thereof been and ought to be subject to such laws, orders, and regulations as are, or shall be made, by the Parliament of England'. Nor was the operative part of the Act confined to the revolting colonies; it contained a general prohibition of foreign shipping trading with the colonies, which was held to be independent of the temporary purposes of the Act, while in 1651[1] the first legislation as to navigation directly regulated trade with the colonies. Nor was the restoration government inclined in any way to abandon the authority thus claimed by Parliament under the Commonwealth. Though the statutes of the Commonwealth were declared null and void, the navigation policy was duly re-enacted with further restrictions in the Acts of 1660, 1662, 1663, and 1673, and in William III's great Navigation Act of 1696 it was definitely provided (s. 8) that 'all laws, by-laws, usages or customs at this time or which hereafter shall be in practice, or endeavoured or pretended to be in force or practice, in any of the said plantations, which are in any wise repugnant to the before-mentioned laws or any of them so far as they do relate to the said plantations, or any of them, or which are in any ways repugnant to this present Act or any other law hereafter to be made in this kingdom so far as such law shall relate to and mention the said plantations are illegal, null and void to all intents and purposes whatsoever'. This provision established clearly the accepted doctrine of the potency of Imperial Acts.

The doctrine, it must be remembered, was nowise new. It had already been applied to the case of Ireland, in the face of the protests of the Irish Parliament, under Henry IV and Henry VII.[2] It had been ruled by the Court in the case of the *Merchants of Waterford* under Henry VII[3] that the Staple Act bound Irish merchants, and that the English Parliament could legislate for Ireland. One of the last acts of Charles I before the final breach with Parliament was his assent on 19 March 1642 to the Act for the reducing of the rebels in Ireland to their obedience to his Majesty and the Crown of England, which included provision for extensive plantation on confiscated lands. This Act was passed in the face of the emphatic declaration of the Irish Commons that the subjects of his Majesty's Kingdom of Ireland were a 'free people and to be governed only according to the common law of England and statutes made and established by Parliament in this Kingdom of Ireland and according to the lawful customs used in the same'.[1] Charles II did not hesitate to bind Ireland by his navigation legislation, and the growing of tobacco was likewise dealt with by Act of Parliament. Even more vehement was the action taken under William III. The proceedings of the Irish Parliament under James II were annulled; Roman Catholics were excluded by Imperial Act, and the woollen industry destroyed, while the improvident grants of the King were later resumed under authority of Imperial Acts. The effort of Ireland to deny the right thus to legislate and the claim of the Irish House of Lords to be the final court of appeal were absolutely negatived by the Act of 1719, in which, as in the legislation of William III, the Irish Parliament acquiesced. The arguments of Patrick Darcy, Richard Bolton, William Molyneux, and Swift were answered not merely by Mayart, John Cary, William Atwood, and others, but by the emphatic declarations of the Imperial Parliament, in which the Irish Parliament must be deemed to have concurred.[2] The form of the coronation oath[3] under the revolutionary settlement emphasized the dependence of the dominions; the new sovereigns were 'to govern the people of this Kingdom of Great Britain and the dominions thereunto belonging according to the statutes in Parliament agreed on, and the respective laws and customs of the same'. The claim for immunity from the legislative power of Parliament was, indeed, to be raised in the colonies from time to time and ultimately to be formulated by the Continental Congress in 1774, but the legal right to legislate was clearly established as an essential principle of English constitutional law.

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[1] Firth and Rait, ii. 559.

[2] Ball, *Irish Leg. Systems*, ch. ii.

[3] Y.B. 1 Hen. VII, f. 2.

The growth of Parliamentary legislation inevitably had a serious effect on the prerogative. James I and Charles I had relied on prerogative powers to guide and control the course of commerce between England and her dominions. With the adoption of legislation by Parliament these powers ceased to be used. They could not effectively be employed where the field was covered by legislation; the prerogative indeed could not be taken away by implication, but where the subject-matter had been dealt with by Parliament its exercise might effectively be nullified. Moreover, Parliament could supply the necessary sanctions to make its legislation effective, while the prerogative power was early held to be definitely restricted within very narrow limits in the case both of settled colonies and of colonies by conquest or cession, if in the latter case the grant was made of English law to the inhabitants.

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[1] Nalson, *Impartial Collection of Great Affairs of State*, ii. 584.

[2] Ball, op. cit., ch. iii–viii.

[3] Wickham Legg, *Eng. Coronation Rec.*, pp. xxxi, 326.

2. *Settled and Conquered Colonies*

If Englishmen with royal authority settled abroad, the King by the prerogative doubtless might govern them, but how far did this prerogative extend? Had he further or greater authority than in the case of England itself? Could he legislate for them by Order in Council? Or was his power confined to conferring on a colony of settlers a legislative system based on the English model? It is hardly surprising that opinion on this issue was far from clear at the outset, and that James I with his high ideas of the prerogative should have contemplated, as he clearly did in the First Charter of Virginia in 1606, the government of the new colony through legislation passed by virtue of the prerogative. But the proposal soon proved impractical, and legal theory seems to have early realized that any such claim could not be held to be consistent with the grant of English law. In *Calvin's* case[1] we find a doctrine set out as indubitable, which is of importance in this regard. 'If a King', it is said, 'comes to a Kingdom by conquest, he may at his pleasure alter and change the laws of that Kingdom, but until he doth make an alteration of those laws the ancient laws of that Kingdom remain; but if a King hath a Kingdom by title of descent, then seeing by the laws of that Kingdom he doth inherit the Kingdom he cannot change the laws of himself without consent of Parliament. If a King hath a Kingdom by conquest, as King Henry II had Ireland, after King John had given to them being under his obedience and subjection the laws of England for the government of that country, no succeeding King could alter the same without Parliament'. It required little acumen to deduce from these accepted doctrines the principle that in a settled colony the subjects enjoyed English law as of right, and could not be legislated for save by the King in Parliament, or by a local legislature in which they were represented, and that in a conquered colony the King's power was absolute, but only if he refrained from granting to his subjects the boon of English law.

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[1] (1608) 7 Co. Rep. 1; 2 St. Tr. 559.

A difficulty, however, presented itself in the application of the doctrine. The lands on which settlement was to be effected were in part scantily populated or even without population, but in other cases there were Indian tribes which might put forward claims of ownership and sovereignty. Might not then all the colonies be deemed conquered or ceded, and subject to unfettered royal control? But adopting principles popularized by Wycliff, English lawyers denied Indian tribes true dominion or sovereignty, which Spanish jurisprudence was more ready in theory to admit, and thus acquisition of territory from such tribes, whether by agreement or force, was deemed not to consist of territorial cession or conquest, which were recognized only in the case of acquisition from a European power.[1] In 1647, however, the issue was discussed before a Parliamentary Committee appointed to consider a claim by London merchants and Barbados planters against the validity of the grant of the Caribbee Islands made to the Earl of Carlisle in 1627–8.[2] In defence it was contended that, as the King was always at war with heathen peoples, any acquisition of land in St. Kitts even by peaceful purchase by Englishmen must be deemed to inure to the King, whose allegiance bound them wherever they were, so that they could not acquire anything for themselves from his enemies. Over lands so acquired the King had absolute power of disposal. As regards Barbados, which was merely settled without conquest or purchase from Caribs, the doctrine was advanced that no land title could be pleaded against the King save such as rested on deed or grant. In more modern form these are the doctrines that no subject can acquire sovereignty save for the King, as was laid down in the case of the East India Company, and that the King is owner in a colony of all lands which he has not granted away, a rule enforced in respect of Australia no less than of America. No formal report was ever made by the Parliamentary Committee, but the patent was allowed to stand.

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[1] Cf. *Johnson* v. *McIntosh* (1823), 8 Wheaton 543; Wheaton, *Int. Law* (ed. Keith), i. 101 ff.

[2] Williamson, *The Caribbee Islands under the Proprietary Patents*, pp. 126–9; Stock, i. 191–4.

The conquest of Jamaica, however, presented the problem in a more modern light, for it was taken in 1655 from Spain, and, therefore, was regarded as a conquest in the full sense. But it soon became obvious that, while no one questioned the power of the King to rule at pleasure a conquered island, there would be no chance of settlement without security for English rights. The King accordingly, following the precedent of Art. 15 of the Virginian Charter of 1606, and rejecting the suggestion of the Council for Foreign Plantations to proceed by Act of Parliament, issued under the prerogative a proclamation of 14 December 1661, that 'children of any of our natural born subjects to be born in Jamaica shall from their respective births be reputed to be and shall be free denizens of England, and shall have the same privileges to all intents and purposes as our free born subjects of England'.[1] This, as in the case of Virginia and the later Charters, embodies the rule of law that birth on English colonial territory carries with it the status of an English subject, but it meant also in the opinion of the Jamaicans that they ought in the island, as well as when in England, to enjoy the privileges of English law. The same view was held by the Council for Foreign Plantations, and the royal instructions to Lord Windsor of 21 March 1662 contemplated legislation, by Governor, Council and Assembly 'not repugnant to any of our laws of England'. It was, therefore, perfectly legitimate for Windsor to proclaim at Barbados *en route* to his government as an encouragement to settlers 'that in all things justice shall be duly administered, and that according to the known laws of England or such other laws not repugnant thereunto as shall be enacted by the consent of the free persons of the said island'.[2] Jamaica thus though conquered was given English law and power to legislate. Was this grant revocable? The Attorney-General in 1676[3] doubtless was right in asserting that conquest made the King absolute sovereign, free to impose what laws and constitution he pleased, and that the inhabitants of a conquered colony had no inherent right to English law. But, if such law were granted and no power to revoke it reserved in the grant, could the Crown alter the constitution or legislate? The rapid development of the claims of the Jamaican legislature made the matter one of pressing importance, demanding the earnest consideration of the Lords of Trade, the Privy Council Committee, which in 1675 became responsible for the colonies. They found[1] that the legislature had assumed in 1675 the right to appropriate revenue from quit-rents belonging to the King; to appropriate tax revenue for the use of the island, omitting mention of the King and denying the right of his Receiver-General to take charge of the imposts; and to hamper his choice of officers by requiring exorbitant security from appointees. Moreover, it had sought to declare all the laws of England in force, endangering the island's security; 'for the laws of England favour not any guards or standing forces. The statutes here have taken away the power and authority of the Council Board, and several other things are enumerated which, considering the remoteness of that frontier place, might leave all in confusion if everything that is law in England should at the demand of every subject there be strictly put in execution'. It was determined,[2] therefore, to curb legislation by applying to Jamaica the system applicable to Ireland under Poyning's Law passed in the Irish Parliament in 1495, under which the functions of Parliament were reduced to acceptance or rejection of measures in a form approved by the King in Council in England. A new Governor, Carlisle, was therefore appointed to carry with him a number of bills approved in England to be enacted finally in Jamaica, while in future no Assembly should be called save with the royal approval obtained in advance, and drafts of proposed legislation must be submitted to the King to be reviewed and then sent back for enactment in final form. Significant changes were made in the bills passed under the Great Seal for approval by the Assembly and then to be assented to by the Governor; revenue was to be paid to the King's Receiver-General and applied by the Governor and Council, without specific appropriation by the legislature; the number of representatives in the Assembly was not to be defined by Act but determined by the Governor; and no provision was made to declare English law as a whole in force.

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[1] C. C. 1661–8, nos. 107, 195.

[2] Ibid., nos. 259, 324.

[3] C.C. 1675–6, no. 972.

The issue was vital, and the Jamaican Assembly opposed an absolute refusal to assent to the bills laid before it, and in 1678 and 1679 insisted that it alone controlled finance. The Lords of Trade had at first felt no doubt as to the legal position; as laid down on 28 May 1679,[1] it held that colonists could claim privileges only if granted by Charter or other solemn instrument under the Great Seal and that the King was not bound by mere commissions and instructions to Governors. Was this sound in law? A deputation from the island denied the doctrine, and from April to October 1680 the issue occupied the close attention of the Law Officers and the judges, including North C.J. who was specially called in.[2] It is significant that no reply from the judges can be found to the inquiry definitely put to them, whether the grant of English law and a representative legislature had left it still open to the Crown to legislate for the island, nor can there be any doubt that the reply if recorded was in the negative, for on 28 October[3] it was announced that the King had decided to apply to Jamaica the system in force in Barbados, which was merely a euphemism for a complete return to the old constitutional system. It is interesting to note that even the Attorney-General would go no farther than to hold 'that the people of Jamaica have no right to be governed by the laws of England but by such laws as are made there and established by his Majesty's authority', and the Solicitor-General gave the interesting ruling that the Acts of tonnage and poundage, though mentioning the dominions of the Crown, could not be construed as really intended to apply to the colonies, thus disappointing the hope of the Crown that thus it might be able to raise a revenue independent of the legislature. The doctrine thus indubitably emerged that the right of the Crown to legislate for a conquered colony disappeared if a representative legislature were conceded. But it was not yet absolutely free from doubt. The immediate struggle was ended, because in 1683 the skill of the new Governor, Lynch, obtained a grant of revenue for twenty-one years from the legislature in return for which the Crown confirmed for a like period a large number of Acts desired by that body, and the procedure was renewed in 1703. Difficulties, however, arose in 1724, when it was feared

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[1] C. C. 1677–80, no. 226.

[2] A.P.C. i, no. 1177.

[1] C.C. 1677–80, nos. 960–2, 1000, 1009, 1011–14.

[2] C.C. 1677–80, nos. 1322–3, 1346–7, 1405–6, 1540, 1546, 1550–1.

[3] Ibid., no. 1561.

that the legislature might refuse supplies, and Sir Philip Yorke and Sir C. Wearg advised in effect that, if Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants, but if it was to be considered in the same light as the other colonies no tax could be imposed upon the inhabitants, but by an Assembly of the island or by an Act of Parliament.[1] Very different was the view of the Assembly which in the Revenue Act of 1723[2]—promptly disallowed by the King—asserted from common reason and the law of nature the right of the conquerors and settlers who made the island part of the English dominions to all the rights of Englishmen, and supported their claim to unfettered power to legislate by the grant of representative institutions and the coronation oath of William and Mary. The issue was compromised by the passage in 1728 of a permanent revenue Act in return for confirmation of a large number of Acts, though permission to enact Habeas Corpus in the full English style was still refused.

In 1769 a new point of view was suggested by Mansfield[3] who thought that Jamaica might be regarded as really a settled, not conquered, colony as the Spaniards had evacuated it before it was settled, so that English law was from necessity introduced there so far as it suited local conditions. This rather odd view may be explained by his undoubted reluctance to lay down the doctrine that the royal grant of a representative constitution had deprived the King of legislative power. Nor are the motives for his reluctance obscure. The royal proclamation of 1763 had promised to Canada a representative constitution, and events had shown the British Government the difficulties inherent in keeping this promise. It was obviously very difficult to approach Parliament with a definite proposal to take away what the Crown had promised, and Mansfield doubtless did not desire to commit himself clearly to the doctrine that a representative legislature, once granted, could not be cancelled save by Act of Parliament. This issue, however, he was soon forced, however reluctantly, to face in the decisive case of *Campbell* v. *Hall*,[1] decided unanimously by the Court of King's Bench on 28 November 1774, after considerable delay. Hall, collector for the King at Grenada, had levied an export duty of 4½ per cent. on sugar exported from the island by Campbell, on the authority of letters patent of 20 July 1764 imposing this duty as in the case of the Leeward Islands. For Campbell it was argued that the royal proclamation of 7 October 1763 had promised an Assembly to the island, and that the letters patent of 9 April 1764, containing the Governor's commission, empowered him to call an Assembly and legislate in the usual form observed in the royal colonies. These acts, it was argued, precluded the imposition of taxation by the King. The island, it was admitted, had been surrendered by the French officer in command in 1762 and had been ceded by the treaty of Paris in 1763. Lord Mansfield's judgement lays down as certain the propositions:

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[1] Chalmers, *Opinions*, i. 223.

[2] Whitson, *Const. Devel. of Jamaica*, p. 145.

[3] *R.* v. *Vaughan*, 4 Burr. 2494. Contrast Holt C.J. in *Smith* v. *Brown* (1705), 2 Salk. 666 on Virginia as a conquered colony.

1. A country conquered by British arms becomes a dominion of the King in the right of his Crown and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

2. The conquered inhabitants once received into the conqueror's protection become subjects, and are universally to be considered in that light, not as enemies or aliens.

3. Articles of capitulation upon which the country is surrendered and treaties of peace by which it is ceded are sacred and inviolate according to their true intent and meaning.

4. The law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there. Whoever purchases, sues, or lives there puts himself under the laws of the place and in the situation of its inhabitants. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations has no privilege distinct from the natives while he continues there.

5. The laws of a conquered country continue in force until they are altered by the conqueror.[2] The justice and antiquity

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[1] 1 Cowp. 204; 20 St. Tr. 239. A like duty had been imposed on the conquered part of St. Kitts in 1704; A.P.C. ii. 455.

[2] Cf. *Blankard* v. *Galdy* (1693), 2 Salk. 411; Memo. 2 P. Wms. 74, where a law contrary to religion or *malum in se* is excepted. The issue of the legality of using torture arose in Trinidad; *Picton's* case (1804–12), 30 St. Tr. 225, 899 ff., 913 ff.; cf. Clark, *Col. Law*, p. 5.

of this maxim are incontrovertible; and the absurd exception as to pagans mentioned in *Calvin's* case shows the universality and antiquity of the maxim. That exception could not exist before the Christian era and in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provides and agrees that they shall continue to be governed by their own laws until his Majesty's pleasure shall be further known.

6. If the King has power (and when I say the King I mean in this case 'the King without the concurrence of Parliament') to alter the old and to make new laws for a conquered country—this being a power subordinate to his own authority as part of the supreme legislature and Parliament, he can make none which are contrary to fundamental principles. He cannot exempt an inhabitant from the laws of trade or the authority of Parliament or give him privileges exclusive of his other subjects; and so in many other instances that might be put.

Lord Mansfield adduced as clear cases of the power of the King over a conquered land the constitutional changes effected in Ireland, in Wales, in Berwick, in Calais, as well as in New York, Minorca, and Gibraltar, and explained the absence of any decided case on the topic because the matter was too clear for dispute, and he adduced in support of this view the dicta of the judges in *Calvin's* case and the opinion of Sir P. Yorke and Sir C. Wearg mentioned above. He held, therefore, that there could be no doubt of the power of the King to impose the duty unless that power were held to have been lost through the issue of the proclamation of 7 October 1763 promising an Assembly, the proclamation of 26 March 1764 inviting settlers on the basis of the constitution promised in October, and the commission of 9 April. The court was clear in its opinion that the promise of an Assembly deprived the King of the power to legislate; it was an assurance of the possession by the settlers through their representatives of a negative voice in all legislation and taxation, and, as the offer had been acted upon, it could not be recalled. The impost in itself was just and proper, but, through its postponement, it could not now be imposed save by an Act of the local assembly or of Parliament.

The judgement stresses the fact that the commission reserved no right of legislation by the King or the Governor and Council pending the summoning of an Assembly, and insisted on the fact that there was no reason adduced why an Assembly might not have been duly called. It suggests, therefore, that it is open to the Crown, when granting representative government, to reserve a power of legislation, and this right to reserve has duly been exercised in respect of later constitutions. One ambiguity is left, the question what were the fundamental principles of law which as a subordinate legislature the King might not violate[1], but the issue was never to be formally decided, and its importance vanished when by the Colonial Laws Validity Act, 1865 the general principle was laid down that repugnancy to English law was confined to cases where a colonial statute was inconsistent with an Imperial Act or regulation under such Act having equal validity, for the term colonial law is so defined as to include legislation for the colony by the King in Council.[2]

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[1] *Globe Advertising Co.* v. *Johannesburg Town Council*, [1903] T.S. 335.

[2] Objections to Mansfield's views by Masères are given in 20 St. Tr. 332 ff.; by Edwards, *W. Indies*, Bk. III, ch. ii.

II. THE ROYAL PREROGATIVE AND COLONIAL SELF-GOVERNMENT (1578–1642)

1. *The Central Organization and Imperial Policy*

COMMERCIAL and financial considerations rather than schemes of territorial expansion or missionary enterprise dictated the policy of Elizabeth and the first two monarchs of the House of Stuart. They had no resources available to undertake Imperial development, and they had, therefore, recourse to private enterprise, especially in the form of organized companies, for the individual adventurer had little prospect of success if he relied on his own means, and in fact would have to fall back on the device of seeking to secure the co-operation of others in the exploitation of his patent. The system of concessions meant that the Imperial government had but an indirect authority over the holders of grants; their operations overseas could not directly be controlled by Imperial officers, and recourse must be had to such control as could be exercised on the grantees through their presence from time to time in England.

Such control as was possible was necessarily exercised by the King with the aid of the Privy Council, which already in Elizabeth's time was wont to advise the sovereign regarding the many colonial projects which were submitted. The more systematic planning of development under James I led to a definite and interesting attempt to create a superior Council resident in England, consisting of members appointed by the King, whose function it would be to have the superior managing direction of the colonies whose establishment was contemplated in the First Charter of Virginia of 1606. This body would not have been technically a Committee of the Privy Council, but would rather have had the nature of a special Commission, and its creation may have been suggested by the Spanish Council of the Indies, under whose control was placed the political direction of the Spanish Colonial Empire. In fact, however, the project failed to materialize. The Charter provided also for the existence of local Councils, each of thirteen members as in the case of the superior Council, and contemplated that they should govern all matters within the colonies to be established 'according to such laws, ordinances, and instructions as shall be in that behalf given and signed with our sign manual and pass under the privy seal of our realm of England'. The King, it seems, contemplated exercising full legislative and administrative control in this manner, but the question whether this procedure was legal was never to be seriously tested. Experience showed that it was impossible thus to secure the investment of capital in the settlement, and in 1609 and 1612 a new system was provided for of the ordinary commercial company type. The Council at London then ceased *de facto* if not *de iure* to exist, and the Privy Council again became the sole adviser of the Crown in matters colonial.

It was under the control of the Council that the Virginia Charter was vacated in 1624. But the Council was too large a body and too busy to spend normally much time on the affairs of a colony, and in 1623 we find the first appointment of a Commission to investigate the affairs of the Virginia and Bermuda Companies, while Commissioners were also sent to Virginia itself to report on conditions there. The Virginia Commissioners were expressly instructed to report to the Council, and side by side with the Commission a Committee of the Council itself was established to frame such regulations as might be proper for the government of the colony as a substitute for the existing scheme of rule. In 1624, after the vacating of the Charter, a new Royal Commission was appointed, composed of a number of officers of State and experts in colonial affairs, to control the government of Virginia, being given the powers vested in the Company by the Charters of 1609 and 1612. This body was continued in office by Charles I when he decided[1] that the government of Virginia should depend immediately upon the King and should not be 'committed to any company or corporation to whom it may be proper to trust matters of trade and commerce, but cannot be fit or safe to communicate the ordering of State affairs, be they of never so mean consequence'. It was, however, then intimated that the King intended later to create a Council in England subordinate to the Privy Council, thus reviving, in a different form and in direct subordination to the Privy Council, the body contemplated in the First Charter of Virginia. The Commission, however, was not very active, and correspondence from the colony was addressed chiefly to the Privy Council, or the Secretary of State who was in close connexion with that body, or directly to the King, and instructions from England emanated from these three sources. The importance of the Commission gradually diminished; Sir G. Yeardley in 1624 was instructed to obey the directions received from the King or the Commissioners, but Harvey in 1628 was only required to obey orders from the King or the Privy Council. Another Commission was appointed on 7 June 1631 to report on Virginian affairs; it suggested the revival of the company form of administration for commercial purposes only, the government remaining in the hands of the King, who should have a resident Council in England to advise him; but nothing came of the proposal, and the Commission itself was superseded by a body of far wider authority,[1] the Commission of 1634 under Archbishop Laud.

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[1] Rymer, xviii. 72, 73.

This Commission was composed of the highest State and Church officials and, though technically it might not be held to be formally a Committee of the Privy Council, virtually it corresponded with the Committee of that body for Foreign Plantations, which was created in the same year and was identic in personnel. It was given power, subject to the assent and approval of the King, to govern all the colonies, to erect courts, and to appoint and remove Governors, judges, and magistrates. It was charged *inter alia* with the examination of the colonial charters in order to ascertain if any privileges hurtful to the Crown or foreign princes had been prejudicially granted. To aid them the Commissioners of Committee could appoint or secure the appointment by the Privy Council of subcommissioners or a subcommittee to investigate and report, while the final decision rested with the Privy Council, which referred matters to the Commission or the subcommittee at pleasure. The position of the Commission in the official hierarchy was duly recognized in the commissions granted to the Governors and their Councils in 1636 and 1641, when they were required to obey such instructions as they might receive from the King, the Privy Council, or the Lords Commissioners, and colonial correspondence was directed not only to the King, the Council, or a Secretary of State, but also to the Commissioners. Detailed investigations were normally left in the hands of the subcommittee or subcommissioners. The importance of the Commission was intended to be of the highest order, for it was created largely to curb the growing reluctance of Massachusetts to recognize its due subordination to the Crown, but, though under its auspices legal action was taken against the Charter, the growth of domestic troubles precluded the successful assertion of royal control. In its work of government the Commissioners had the advice not only of the subcommittee, but also of the Lord Treasurer and his subordinates and of the various Councils or Committees of Trade established by the Stuart régime, while the economic policy of the government was furthered by the use of vessels under the control of the Admiralty to compel obedience to the efforts to direct trade to England.

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[1] Andrews, *British Councils of Trade*, pp. 16 ff. emphasizes its *de facto* unimportance.

Modes of applying the royal authority to the settlement of colonies were inevitably tentative and uncertain. There was the proprietary grant such as that made in 1578 to Sir Humphrey Gilbert, a mode often used; not essentially different in principle, though diverging in development, was the grant to a joint stock company in lieu of an individual proprietor, as in the case of the Virginia Company, a method which was also to play a great part in the evolution of constitutional government. Or the commander of an expedition might merely be granted authority to take possession of territory, the Crown reserving the right of final disposal; such commissions were held by Charles Leigh in the Wiapoco adventure in 1604 and by Robert Harcourt in Guiana in 1609. More remote from royal control was the process under which a chartered company like the New England Company might let out to settlers portions of its territory, leaving the settlers to seek, if they thought fit, recognition from the Crown or to carry on without such authority. Or again territory might be occupied by a subject and then authority to govern it asked from the Crown, as in the case of St. Christopher, which Warner first occupied without royal commission.[1] The system of direct authority from the Crown to occupy and administer, for and under the Crown, was left to be evolved through the forfeiture of the Virginian Charter; only after the preliminary work had been done at the expense of others was the Crown prepared to take over the obligations as well as the privileges of government. But this attitude involved an inevitable result. The colonies were forced to gain their strength without serious royal aid, and the spirit of independence thus generated presented a fatal obstacle to effective royal control, so long at any rate as the King was determined to rely on the prerogative and refused to permit Parliament to intervene in colonial government. This was the fundamental weakness of the Laud Commission. Its authority was based solely on the King's own power, and that proved quite inadequate to permit of effective control of oversea possessions.

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[1] Williamson, *Caribbee Islands under the Proprietary Patents*, pp. 25 ff.

2. *Virginia*

The First Charter of Virginia[1] contemplated the foundation in America of two distinct colonies, the one promoted by merchants of London, the other by representatives of Bristol, Exeter, and Plymouth, and the Charter transfers to these bodies, whom it styles colonies, the entire possession of territory and its appurtenances within limits specified, authorizing them to inhabit the lands and to fortify them and forbidding settlement in the hinterland without licence. It provided for the creation, in addition to the superior Council in London already mentioned, of a Council for each colony to rule subject to royal control, and to be composed as described by any instructions of the King. Exploitation of mines was permitted on payment of a fifth of gold and silver and a fifteenth of copper, and the Councils might coin money. Licence was given to take from England settlers with victual and warlike stores, and to repel all those seeking to settle within the colonies without permission. Moreover, for twenty-one years the Councils were authorized to levy taxation at 2½ per cent. on goods bought and sold by English subjects and 5 per cent. on transactions by foreigners, the right to revert to the Crown at the end of that period. For seven years the Crown renounced export duties on victuals and warlike stores exported. By a clause of fundamental importance[2] there was assured to those subjects dwelling in the colonies and their children born there the same rights within any other part of the King's dominions as belonged to residents therein. The colonists were not to act with hostility to any Christian prince on pain of outlawry and delivery to the mercy of the adversary; but no protection was accorded to the Indians whose lands were assumed, characteristically, to be at the royal disposal, the King promising grants in free and common soccage as of the Manor of East Greenwich to those recommended by the two Councils.

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[1] 10 Apr. 1606; Macdonald, *Charters*, pp. 1 ff.

[2] Confirmed by Parliament, 31 Aug. 1652; Stock, i. 230 f.

Further definition of the system of government was given by royal instructions of 20 November and 10 December 1606, and the constitution of the Council of Virginia, the only colony established, was defined and powers assigned to it by an Ordinance of 9 March 1607. Under this régime justice was clearly badly administered, for a time Smith usurped sole power to govern, and it is not surprising that in order to secure settlers it was necessary in 1609[1] to issue a new Charter, which adopted the model of that accorded to the East India Company in 1600. The Treasurer and Company of the Adventurers and Planters of the City of London for the First Colony in Virginia were created a body corporate, with perpetual succession, and a common seal, possessing the capacity of suit, and of holding land under licence, and upon the company was conferred the power to dispose of the lands of the colony. For the government of its affairs a Council was named, but vacancies were to be filled by the Company, though Councillors were to take an oath as Councillors to the King. The Council was given full power to appoint and remove Governors and other officers, and to establish laws and forms of government, including power to regulate the conduct of persons *en route* for and from the colony. Full authority was given to the Company and its officers to govern, punish and pardon the King's subjects according to the orders and constitutions of the Council, and, in default, in case of necessity according to the discretion of the officers in all matters, criminal or civil, on land or sea, subject to the rule that ordinances and proceedings should as nearly as possible be agreeable to the laws, statutes, government, and policy of the realm of England. In case of rebellion or mutiny the principal Governor might exercise martial law. New members might be admitted to the Company by the Treasurer and three Councillors, while the Company could remove members. The powers given to the Council as opposed to the Company were clearly too wide, and in 1612[1] the matter was regulated by conferring the appointment of Councillors, the selection of officers, and the making of laws, on the four Great and General Courts which must be held each year at prescribed times, and by which matters of government, of granting of lands, and arrangements for trade must be determined, minor and casual affairs being left to the Treasurer with four Councillors and at least fifteen other members. To the Council was assigned—without legal warrant—power to deal with persons who decried the plantation.

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[1] Macdonald, *Charters*, pp. 11–16.

The new régime was followed by reorganization on the basis of strict control by a Governor with a purely advisory Council locally and the exploitation of the territory of a system of joint exploitation, negating private ownership. Under Lord Delaware (1610) and Dale (1611–16) a military régime prevailed, supported by a code of civil and martial law, borrowed in part from the Netherlands. The worthlessness of such a régime showed itself under Argall (1617–19), whose misdeeds could not be checked for lack of any local means of control. Happily Sir T. Smith was ousted from control of the Company by Sir E. Sandys and Lord Southampton, who substituted a régime of individual ownership, freedom of trade, and encouragement of immigration by associating the settlers in the government. In 1618 it was determined to place beside the Governor and Council in London the General Assembly in the colony, composed of the Council of State and two burgesses chosen from each town, hundred, or other particular plantation, and Yeardley in July 1619 convened the first Assembly to meet in America, consisting of twenty-two members. It asserted the right to be judge of returns of members, to examine the instructions of the Governors and petition for change, and to legislate on trade, Indian relations, and morals. While admitting the negative voice of the Company, it asked that it might be accorded a like negative on orders of the Governor and Council in London, and an Ordinance of the latter of 24 July 1621[2] promised that this concession would be made in due course. This arrangement never became effective, but in 1624 the legislature not merely provided for the enforcement of worship according to Anglican rites, municipal institutions, and a capitation tax, but laid it down that only with its authority could any tax be laid on land or commodities, and that monies must be levied and employed as it directed. The change from the earlier period is striking, but it must be doubted whether the system of legislation by the Council or Company was validly conferred and exercised, unless Virginia was really a conquered colony.

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[1] Macdonald, *Charters*, pp. 17–23.

[2] Ibid., pp. 34–6.

Jealousies in London, the Indian massacre of 1622, heavy mortality among the settlers, and the King's desire to control Virginian trade and confine it to England, led to the determination to vacate the Charter, which was effected in Trinity Term 1624 in King's Bench[1] under a writ of *quo warranto*, it being declared that the privileges had been usurped. Proposals to regrant the colony under a new patent were long discussed but did not come to fruition, and Virginia thus became the first royal colony. The change was not very marked in the colony. The Governor, however, was commissioned to act with his Council in the time of Harvey (1628), Wyatt (1639), and Berkeley (1641), and the instructions to the latter show increased control. English law was to be followed in the form of the administration of justice both in the county and the General Court. The appointment of inferior officers appertained to the Governor. He was also charged with securing the carrying out of military training of men between 16 and 60, and relations with the Indians were to be regulated in the interests of defence. Matters of trade were commended to the Governor's care; bonds must be required from ships carrying exports that the goods should be landed in the King's dominions; if the ships were foreign, they must be taken to London. Bulk must not be broken until the ships reached Jamestown. Tobacco-growing should be discouraged in favour of hemp, flax, pitch, tar, corn, wheat, wine, and silk, and of cattle-raising. Towns should be built and unimproved lands regranted. The functions of the Governor included the furtherance in every way of the Church of England, for whose ministers houses and glebes should be supplied.

The legislature, after a period of suspension which aroused anxiety and petitions for its maintenance, was duly revived. The Governor and Council sat with the burgesses in a single house, and the joint body asserted again in 1632 and 1643 its sole right to tax and determine the application of the funds raised. The approval of the Assembly to itemized lists of sums due formed the authority for payment by the Treasurer. A poll tax and tonnage duty first imposed in 1632 furnished funds, while the Assembly regulated fees of office, which afforded the chief remuneration of the officers of government. The Governor was promised a salary of £1,000 from the royal customs, but failed to receive it, recouping himself by raising his own fees of office, which together with fines had been assigned to him. Quit-rents at 2*s*. per 100 acres were more or less regularly exacted after 1636 when J. Hawley was appointed Treasurer. Local administration rested largely, under acts of the Assembly, with commissioners of counties who served also as justices. They were appointed and controlled by the Governor and Council, and a close relationship was early established between them, forming the source of the aristocratic element in Virginian government. Important civil suits and criminal matters involving life or limb were decided by the Governor and Council sitting as the General Court; appeals especially in cases outside the ordinary run were heard by the General Assembly. The grant of land was carried out by the Governor, but largely on the lines usual during the last period of the administration of the company. On the whole, the system worked smoothly enough, and the royal supervision was not ineffective. When a clergyman, Panton, offended the Governor and Secretary by aspersions, and in punishment was deprived of his dues and property and banished, on appeal to the Privy Council he was reinstated and Harvey was replaced by Wyatt as Governor.

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[1] Osgood, *Am. Col. in 17th Cent.*, iii. 51–3.

3. *Massachusetts*

While Virginia was developing as the typical royal province a very different train of events was preparing Massachusetts for her constant role as the leader of resistance to Imperial control. The circumstances of its origin were unusual and explain its subsequent history. While the Virginia Company was developing its concession under the Charter of 1606, the Company which was to have exploited the northern region had effected nothing, and fishing expeditions from the Virginian colony had busied themselves in the waters of the northern colony. But in 1620 the survivors among the grantees of the original Charter petitioned the King for a new Charter for New England, as the northern area had come to be called, and obtained the inclusion in the Charter of a monopoly of the fishing. This evoked a strong protest from the Virginia Company, and the Privy Council approved of a compromise under which each Company could fish in the waters of the other. It was apparently intended that both Charters should be amended to this effect and confirmed by Parliament. Sandys pressed the issue on Parliament and Gorges was required to answer the charge of seeking a monopoly. He defended himself energetically and enlisted the aid of the opposition faction in the Virginia Company, while Sandys fell into great disfavour with the Crown through his support of a bill to declare the fishing on the coast absolutely free. Ultimately an Order in Council of 18 June 1621 ordered the final delivery of the New England patent on the understanding that the Virginia Company should have rights of fishery, but the Charter was never amended to this effect.

The terms of the Charter[1] of the Council established at Plymouth in the county of Devon for the Planting, Ruling, and Governing of New England in America were based on those of the Virginia Charter of 1609, but with an important distinction. The Council was limited to forty members, who were to supply vacancies as they occurred, and it was identical with the corporation. It received full governmental authority and ownership of the land between 40 and 48 degrees N. lat. Its history, however, bore no relation to its ambitions. Gorges, who was its chief promoter, dreamed of grants of territory with powers of government subordinate to a general government, but nothing in the long run eventuated beyond certain grants which formed the basis of colonial development. Of these the most important was the grant made on 19 March 1628 to certain adventurers interested in Massachusetts Bay. The grant is unusual in form, for the territory was to be held not of the Council but of the Crown; apparently the grantees sought thus to extinguish the rights of the New England Council preparatory to obtaining a Charter from the King.[2] This was granted on 4 March 1629, and created a body corporate and politic under the style of the Massachusetts Bay in New England with the usual attributes of an incorporation. The government of the corporation was vested in a Governor, deputy, and eighteen Assistants to be elected annually at the Easter meeting of the General Court, which was to be composed of the freemen of the Company, provided that the Governor and six Assistants at least must be present to make up a quorum. To the General Court, which was to meet four times annually, was assigned the right to admit freemen, to ordain laws not contrary to those of England for the government of the plantation, and to arrange the appointment and functions of officers; fines and imprisonment might be provided for, 'according to the course of other corporations in this our realm of England', the purpose being to dispose the natives to accept the true faith, 'Which, in our royal intention and the adventurers' free profession, is the principal end of this plantation'. The right of fishery was, however, to be open to all the King's subjects together with the necessary use of the shore for that purpose. Under this Charter Endicott speedily established a colony at Salem.

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[1] Macdonald, *Charters*, pp. 23 ff.

[2] Ibid., pp. 37 ff.

So far Massachusetts was of the ordinary type of proprietary colony, but of deliberate purpose, if we believe John Winthrop's testimony given long after, the applicants for the patent had secured that nothing in the Charter should compel as usual the residence of the governing body in London or England. The Puritan interest in England was now in low water; Charles I had dismissed in anger his Parliament, and Winthrop and others determined to seek a fresh home, but only on condition that they could carry the patent and the head-quarters of the Company to their American destination. The Company agreed to this on 29 August 1629, and on 20 October Winthrop's election as Governor marked the decisive step. On 19 October 1630 the first General Court met in Massachusetts, and, though many of the patentees remained in England, the Court never again met there. The joint stock or commercial aspect of the Company had practically disappeared by the close of the year, though some business relations with patentees in England are recorded at later dates. Individual enterprise, however, was now the order of the day, and the Company's business became administrative and legislative. The land question was solved by the practice of recognizing and regulating by order of the General Court the existence of settlements, to which land was assigned for distribution and management; the colony neither established a land office nor exacted as a rule quit-rents.

The non-commercial and strongly religious trend of the Company's policy was revealed at the Court of 19 October 1630, when some hundred settlers applied for admission as freemen. Doubts as to the suitability of the applicants led to postponement and to the passing of a regulation, flatly in the face of the Charter, under which to the Assistants was assigned the election of Governor and deputy and legislative authority, and the freemen were left only with the right to elect Assistants. In May 1631 the illegality of the step was admitted and the Governor and deputy were elected by the Court. This was rendered possible because the Court had laid down the rule that none should be admitted as freemen but such as were members of some of the churches of the colony. The action taken was decisive; it stamped the colony with the spirit of religious exclusiveness and domination which marked its history for more than a century. Moreover, it had great political significance, for at the same time the Assistants were left with the power to legislate, and continued both to do so and to raise taxes. Commanded to pay a rate for fortifying Newtown, the pastor and others of Watertown protested that it was not safe to pay money in this way, for there was danger that they would bring themselves and posterity into bondage. A discussion on this issue took place between the dissentients and Winthrop, who insisted that the protest was misconceived. The government was rather in the nature of a Parliament than of a mayor and aldermen as the objectors suggested. In his view, it is clear, the Assistants were now the elected representatives of the freemen with powers of legislation and taxation as such representatives, and the Company stage was outworn. The freemen could control the Assistants by the elections, and could petition if they had grievances. Watertown yielded, but the result of its protest was seen in May 1632 when the Court reasserted the right to elect the Governor and his deputy and Assistants, and also ordered that two from each plantation should be appointed to confer with the Court as to the raising of a public stock. The proposal seems not to have been carried out, and the next tax imposed was laid on in March 1633 by the Assistants. The townships, however, remained discontented; shortly before the May meeting of the Court in 1634 representatives from the towns waited on the Governor and demanded sight of the patent, and urged representative government. He resisted the proposal, and suggested merely a meeting of deputies to consider matters suitable for legislation and to petition the Assistants. But resistance was unwise, and later the Court accepted a representative system, the freemen of each town to choose two or three representatives to act at the General Court, to which was reassigned the power to make laws, to appoint officers, impose taxes and grant lands, elections being reserved for the freemen. Under an act of 1636 two sessions were normal, in May and October. At the former, at which the outgoing magistrates met the new deputies from the towns and such freemen as cared to attend in person, elections[1] and legislation were carried out; at the October session legislation, while judicial matters might be taken up at either, for the Court was supreme in judicial as in all other matters, executive or legislative. Until 1644 the Assistants and the deputies sat together, but as early as 1636 it was decided that the two elements were distinct, and that the assent of both was needed for legislation. As early as 1635 the deputies were recognized as entitled to decide disputed elections subject to confirmation by the Court.

Normally executive business and judicial business were disposed of by the Governor and Assistants, though the General Court was always available for judicial matters of special importance, and acted as a court of chancery and admiralty as well as of appeal. In these cases it acted as a unit, and voting was by simple majority. The principles of the Mosaic law were freely relied on when English law was deemed inapplicable or inadequate, and, while the legislature was chary as to enacting laws repugnant to English law in the teeth of the Charter, it was held that practices contrary to such law might be allowed: thus civil marriage might be made legal as unwritten though not as written law. The close relation of Church and State resulted in the employment of the whole powers of the State to crush religious dissent; Roger Williams was driven to Narragansett as the result of his consistent advocacy of that religious liberty which in theory the clergy of the colony professed, but which had yielded in their minds to a limited or presbyterianized independence. Mrs. Hutchinson was excommunicated and expelled in 1638 after a trial wholly without justice, and other Antinomians suffered as severely.

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[1] Balloting is found as early as 1634 and the use of proxies in 1636. The towns developed a strong local government by town meeting and select men, with care of commons, poor, police, &c., and power to make by-laws. Voting was not restricted to freemen except for election of deputies. Connecticut adopted the system in 1639.

The rapid development and the creation of an independent colony in Massachusetts was not long concealed from Charles I, who in granting the Charter had been false to his own doctrine in 1625 that matters of government must be retained in royal control. As early as 1632 strong protests were made in England by Morton, Radcliff, and Gardiner, all of whom had suffered from the curious justice of New England, and these were reinforced by Gorges and Mason, who claimed that the grant of the New England Council to Massachusetts affected lands which already had been assigned to them. They alleged that the colony had renounced its allegiance, had separated itself from the laws and Church of England, was ready to rebel and railed against the government and church of the mother country. A committee of the Privy Council, however, which investigated the charges found them unproved and the colony was exonerated.[1] At the same time the appearance of Laud as Archbishop and the pressure on the Puritans in England sent it valuable accessions of population. But Gorges saw the opportunity presented by Laud's fear of Puritan propaganda, and this motive seems to have been largely operative in inducing the creation of Laud's Commission in 1634,[2] to which was granted the widest power of legislation and judicial and executive control of the colonies, together with instructions to further the interest of the Church of England. The New England Council also was to help, for it agreed to surrender its patent with a view to the division of its territory and the appointment of Gorges as Governor-General with royal support. Gorges, however, failed to obtain efficient help from the King who was otherwise busied, and though a judgement on *quo warranto* was duly obtained in 1637 it was ineffective.[3] The difficulty arose that, while it could be enforced against such of the patentees as were in England, those who were in Massachusetts were not effectively within the control of the courts in England, and the Company disregarded placidly several requests to send back the charter on the score that it had been

[1] C.C. 1574–1660, p. 158.

[2] Rymer, xx. 8–10.

[3] *Hutchinson Papers*, i. 114–19

cancelled. Its attitude is sufficiently shown by the determination expressed in 1635 to resist any attempt of a Governor-General to take possession of the territory and in the form of the oath which it imposed on members of the Commonwealth, from which all mention of the King was omitted. Justice likewise was not exercised in the royal name, and there was much reluctance even to allow the King's flag to appear on the fort at Castle Island, which was not only the King's but was maintained in his name.

4. *The Unchartered Colonies of New England*

While Massachusetts at least had a legal foundation for its government, although in erecting representative government and exercising full judicial authority it had gone far beyond the limits of a mere corporation and the terms of its Charter, the rest of the colonies of New England developed their governmental institutions without any legal sanction. First in order of time came the efforts of a body of Separatists at Leyden to settle in America on land obtained by grant from the Virginia Company. In the end, whether by accident or design, the adventurers in the *Mayflower* landed north of the Virginian limits, and their tenure was regularized by a grant obtained on 1 June 1621 from the New England Council. The question of ownership was finally disposed of in March 1641 when the patent for the land was assigned to the freemen of Plymouth by Bradford. Politically the patent was of no importance, for it neither could nor did give the patentees any rights of government, which could be derived from the King alone. In the absence of any legal power the settlers while yet on the *Mayflower* entered into a covenant on 11 November 1620,[1] under which they combined themselves into a civil body politic, with power to enact laws, constitutions and offices for the general good of the colony, to which they pledged all due submission and obedience. Virtually, therefore, the settlers thus erected themselves into a General Court of the normal type with power to make laws and to select officers to enforce them. On the death of Carver, the first Governor, Bradford was elected in his place with one Assistant; the number was increased to five in 1624 and later to seven, among whom the Governor was merely distinguished by his double vote. Annual elections were held and the General Court exercised legislative powers; it imposed taxes, distributed land to townships to which it accorded municipal powers, controlled defence and admitted freemen, including, however, in the oath recognition of allegiance to the King. The growth of townships necessitated a representative system, perfected in 1639 when Plymouth was given five, each other township two members, constituting with the Governor and Assistants the General Court, which controlled all business save elections, which all freemen might attend. The Court remained undivided, despite a proposal of 1649 for division, and no religious test was exacted from freemen, who, however, from 1656 must be approved by the freemen of the place of residence and presented by its deputies.

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[1] Macdonald, *Charters*, p. 33.

Connecticut arose from the union of three townships, Hartford, Windsor, and Wethersfield, settled by men who were attracted by the rich river lands or like Hooker anxious for greater freedom than the arbitrary rule of Massachusetts magistrates allowed. That colony sought at first in 1635–6 to retain control, and its commissioners for a year exercised supervision. On 1 May 1637, however, a General Court, summoned presumably by them, met at Hartford, composed of nine deputies from the towns and six magistrates, apparently elected by the deputies, which at once set up a claim to possess the powers of the General Court of Massachusetts in complete independence. It arranged for defence, judicial matters, Indian trade, and taxation. Proposals for union with Massachusetts were debated between Hooker and Winthrop whose doctrine was oligarchic: 'the best part is always the least and of that best part the wiser part is always the lesser.' Hooker was anxious for a broad foundation of liberty and greater definition of power, but little of this appears in the Fundamental Orders,[1] adopted by a convention of free planters on 14 January 1639 at Hartford. Their chief distinction from the constitutions of Massachusetts and Plymouth lies in the fact that they acknowledge no external authority of any sort, but purport to found a Commonwealth to preserve the purity of the Gospel and the discipline of the Churches and to provide for civil government. There is no attempt to secure the Orders from alteration by ordinary legislation. There is the usual provision for General Courts to meet in April and September; at the former the freemen were to choose a Governor, who must be a member of an approved congregation, and six magistrates who must be freemen. Thereafter legislation could be enacted by the deputies, with the Governor and at least four magistrates; the deputies to be elected four for each original town by the freemen, who were admitted inhabitants and had taken the oath of fidelity. The freemen could convene the General Court if the Governor and magistrates failed to act. To it belonged taxation, legislation, disposal of land, admission of freemen, the control of the churches, brought in 1650 under strict subordination, Indian affairs, and the calling in question of actions of courts and magistrates. Much executive business was transacted by it or its Committees. Admission as freemen was conditional on admission by the inhabitants of a town, a certificate of suitability from the select men (1662), and possession of £30 personal (1659) and £20 real property (1662).

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[1] Macdonald, *Charters*, pp. 60–5.

Equal independence marked the foundation of New Haven by Eaton and Davenport, who were dissatisfied with Massachusetts. After living for a year under a plantation covenant, ecclesiastical and civil, now lost, fundamental Articles[1] were accepted on 4 June 1639 for the establishment of a civil government under God, Church members alone being granted political rights. Twelve were chosen to start the system; they selected seven who acted as magistrates until 25 October 1639 when they laid down office and a Court was constituted, composed of all freemen who were required to take an oath similar to that of Massachusetts and Connecticut, of allegiance to the constitution and of refraining from any plot against it. A magistrate and four assistants were elected, and the word of God deliberately adopted, in lieu of English law, as the basis of government. Expansion took place in 1643, when, in view of the formation of the New England Confederation, it was found necessary to amalgamate the adjacent townships, and a constitution was adopted on 27 October 1643.[2] Only members of approved churches in New England might be burgesses and enjoy political rights. A General Court was to meet in April and October; at the latter session the freemen in person or by proxy were to elect a Governor, Deputy-Governor, and Magistrates for the whole jurisdiction, who with two deputies from each town constituted the Court for all other purposes of making and executing laws, imposing taxes, punishing magistrates, imposing oaths on freemen and free planters, and hearing criminal and civil cases on appeal or complaint. The Court sat as a unit, but, as in Massachusetts, a majority of magistrates and deputies was necessary for any decision. The Court of Magistrates meeting twice a year heard important civil and criminal cases, and acted as a Court of Appeal from decisions of the local magistrates elected for each jurisdiction by the burgesses. The word of God proved inevitably inadequate as a guide and legislation was fairly plentiful, but Church membership was rigidly insisted on as a condition of exercise of political power. Though formed by the agreement of quite distinct townships, the federal element in the constitution was minimal, as in Connecticut. Land titles rested on purchase from Indians as in Rhode Island.

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[1] Macdonald, *Charters*, pp. 67–72.

[2] Ibid., pp. 101–4.

Rhode Island differed essentially in that Church membership was never a condition of rights. It owed its existence to dissidents from Massachusetts, Williams who settled in 1636–7 in Providence, and Coddington and others who in 1638 established themselves at Aquedneck, moving later to Pocasset (Portsmouth), and Newport. Separate governments were set up in these two towns, but in 1640 they united on the basis of acknowledging the sovereignty of the King, establishing a General Court of freemen, but with the retention by each town of its own powers. The two took the name of Rhode Island in 1644, but union with Providence was postponed to 1647.

5. *Bermuda*

The Virginia Charter of 1612 was in part designed to include within the power of the Company the Bermudas or Somers Islands, whose existence was revealed to a ship's crew *en route* for Virginia in 1609. But ownership was speedily parted with, and in 1615 a new Charter was issued incorporating the Company of the City of London for the Plantation of the Somers Islands. The Company during its history to 1684 exploited the island's resources under a system of paternal character, deeply resented in course of time by the settlers, but it did not deny them the privileges of local government. The instructions to the Governor in 1616 provided for a Council in part elected, in part nominated by the Governor, and the two clergymen sent to the colony, while under the Company's instructions in 1620 the first Assembly was summoned, consisting of the Governor, Council, burgesses, bailiffs, and a secretary, to whom were submitted a mass of bills sent out by the Company, fifteen of which were duly enacted and accepted in England. The Company provided in appearance a fairly generous system. An Assembly must be called every second year at least; taxes must be levied and employed as the Assembly should direct, and it was empowered to legislate for the particular occasions and necessities of these islands. But legislation was subject to the approval of the Company in London, and it claimed the right under its Charter to send out legislation which the Governor was required to enforce. No division of the Assembly was permitted, the Governor and Council sitting with and probably overawing the burgesses, while the mere proposals of one Parker in 1625 to bring about the separation of the two houses led to his prosecution for sedition. The legal position can hardly be said to have been irregular, for the concession of legislative authority removed any possibility of serious challenge of the action of the Company, but its economic control was severe, and its action in forbidding emigration and punishing attempts to leave severely—in one case by death—may be deemed to have been illegal. The monopoly of trade insisted on by the Company, on the other hand, can hardly be deemed irregular.

Other chartered companies fared less well. Nothing came of Richard Penkevell's Charter of 1607 for the discovery of the north-west passage, and the Guiana Company's Charter of 1627, though it was not wholly inoperative, did not secure any abiding settlement. The Providence Island patent of 1630, enlarged in 1631, led to exploitation, but ultimately the enterprise was defeated in 1641 through foreign opposition. Of greater historical importance is the case of Newfoundland, which has the interest also of presenting the other type of constitution, the proprietary grant.

6. *Newfoundland*

English sailors were early concerned in the fisheries of Newfoundland. Henry VII's act as to buying fish excludes their operations from its purview, and their activities are recorded also in Edward VI's statute book and that of Elizabeth. Nor is it surprising that it was on Newfoundland that the first serious attempt at colonization was projected under the patent granted to Sir Humphrey Gilbert in 1578. The terms of this instrument are of interest and importance, for it goes farther into detail than the earlier patents issued in the days of the commencement of English oversea enterprise. Thus the patent granted in 1497 to John Cabot and his sons merely authorized them to possess the lands they should subdue as vassals and lieutenants of the King, in whom the rule, title and jurisdiction should rest, while the grantees should have a monopoly of trade, paying one-fifth of their profits to the Crown. The Charters of 1501 and 1502 granted to Warde Ashehurst and others go farther in allowing the grantees to occupy the lands discovered as vassals of the King by fealty without payment, enjoying rights of government and exclusive trade. But these Charters were not followed up by effective action, and Gilbert's Charter[1] was issued when more definite prospects of settlement were known to exist. The lands which he was to discover were to be held by homage as a royal fief, but all services were to be discharged by payment of a fifth of the gold and silver which fancy expected to find, and in effect the tenure became little more than that of soccage. For a period of six years under licence Gilbert might export settlers to his colonial territories, where the settlers would remain under allegiance to the Crown, but would be subject to subordinate rights of government administered by Gilbert, which must be in general agreement with the laws of polity of England, and consonant to the form of religion professed by the Church of England. Vast powers of granting land were conferred and a right to exclusive trade. The early efforts to act on the patent failed, but in 1582 Gilbert conceived a grandiose scheme under which a settlement would have been carried out under a Company to which, however, powers of government were not ceded. He seems to have planned to create a miniature reproduction of

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[1] Hakluyt, *Voyages* (ed. 1904), viii. 17.

English society in his territorial possessions, and it is worth noting that, while he contemplated the raising of assessments for purposes of defence, the money raised was to be used with the consent of the chief Governor and of the majority of a council of thirteen persons chosen by the people. In fact the expedition of 1583 did result in the formal taking possession of the land in the name of the Crown of England in the presence of thirty or forty fishing vessels. He further ordained three laws: the establishment of the Church of England, the punishment as high treason of any attempt prejudicial to her Majesty's rights in the territory, and the imposition of the penalty of loss of ears, of goods and ship for the uttering of words of dishonour to her Majesty. 'All men did very willingly submit themselves to these laws', and application was at once made to Gilbert to grant in fee farm fishing stages and drying places, while further directions were given by Gilbert 'as absolute Governor there by virtue of her Majesty's letter patent'. Unhappily for Newfoundland, he declined to make grants of substantial size, inaugurating the policy which for many years was to treat Newfoundland as a mere convenience for fishermen and to retard its settlement; but his untimely death on the return voyage ended the enterprise and damaged the fortunes of the colony. But, despite the objections of the west country fishermen to any settlement on the island, small groups did succeed in staying there, and in 1610 after three years of efforts a Charter[1] was issued incorporating the Treasurer and Company of Adventurers and Planters of the City of London and Bristol for the Colony or Plantation in Newfoundland, and giving to the Company the area from Cape St. Mary's to Cape Bonavista. The land was to be held in free and common soccage as of the Manor of East Greenwich on the usual terms of paying one-fifth of the gold and silver. A Council of twelve was nominated, to which was entrusted the power of government, including the establishment of laws and forms of government. There were granted the usual exemptions from customs in Newfoundland for twenty-one years, the right to repel intruders, the power to punish offenders on land or at sea according to the orders of the Council, or failing them the discretion of the Governor in cases capital and criminal as well as civil, marine and other, and authority to the chief

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[1] C.C. 1574–1660, p. 9; Prowse, *Newfoundland*, pp. 122 ff.

Governor to exercise martial law in case of rebellion or mutiny. Stress was laid on the religious interest of the Crown; as in the case of Virginia the oath of supremacy was to be exacted of all would-be settlers in order to prevent the entry into the land of those professing Romish superstitions. A right to outlaw settlers who offended against Christian nations was also retained, but the natives' claims were as usual ignored. On the strength of the Charter John Guy, as first Governor in August 1611, issued a series of regulations for the management of the fishery as regards the use of the beach and harbours, which were requisite for drying the cod caught on the banks. His effort to enforce some form of law was bitterly resented by the Devon fishermen who petitioned the King, though in fact the Charter was absolutely clear on forbidding any interference with the right of fishery, and the regulations were in the common interest of the fishers. The company lasted for some years, but the most interesting legal feature of the period is the appointment of Sir Richard Whitbourne in 1615 as Vice-Admiral and the account he has left of his attempt in that capacity to inquire into irregular practices. Various subsidiaries of the London and Bristol Company's enterprise spring up, but constitutionally interest attaches only to the new departure, in 1623, when James I decided to gratify his courtier Calvert by a grant in Newfoundland, reviving in his favour the plan of a proprietary grant.[1] For that there were recent parallels, apart from Raleigh's patents of 1584 and 1616, for in 1613 Robert Harcourt had had a patent for his Guiana venture, and North one for the Amazon in 1619, though the King of Spain succeeded next year in securing its recall. The patent granted to Calvert was the model for that which was issued to Baltimore for Maryland in 1632 and which had a long life, as well as that of 1629 for Carolana, which Sir Robert Heath received but did not use, and that of 1639 which gave Gorges and his heirs a claim to Maine.[2]

The model of government now adopted was that familiar to contemporary England through the continued existence of the County Palatine of Durham, which preserved in a limited degree the tradition of the semi-independent Palatinates. Since Henry VIII the privileges of Durham had been essentially reduced, but in a new land it was possible to revive them without derogating from any principle of constitutional law, and this James I proceeded to do. He granted Sir George Calvert the province of Avalon, so styled *in maiorem gloriam* of the grant, with civil rights as extensive as those enjoyed by the Bishop of Durham. The region was to be held by Knight's service *in capite* paying the usual fifth part of gold and silver. The grantee could legislate with the freeholders, and pass ordinances for emergency purposes without them, appoint judges and grant pardons, create towns and grant titles of honour, muster and train men and exercise martial law; exemption from customs was granted for ten years, and the power to tax was renounced by the Crown. Free fishery on sea and privileges of drying fish on land were expressly reserved for all English subjects. The climate, however, defeated Calvert's aims, and he later received Maryland in lieu, though as late as 1754 a claim was made by his family in respect of Avalon which was refused by the Crown on the score of non-occupation. Yet another proprietary grant[1] was attempted, on 13 November 1637, to the Duke of Hamilton, Sir David Kirke and others, who were granted powers practically identic with those of the Avalon Charter, though the reservation and exclusion from the patent of all control of the fishermen was made more emphatic still, and the use of the shore within six miles from the sea between Cape Race and Cape Bonavista was forbidden. The patent was put in operation for a time by Kirke, who made use of the power granted to raise a duty of 5 per cent. from French visitors to Newfoundland, and was upheld by the King, but his enterprise was ultimately ruined and he himself died in prison in England. For the regulation of the fisheries Charles I relied on the prerogative, and rules[2] were laid down in 1633–4 in the form of a charter issued to govern the Merchants and Traders of Newfoundland. The rules concern mainly the prevention of disputes among the fishermen, but they recognize the established rule by which the first captain to arrive at a harbour was regarded as admiral of that harbour with first right to occupy a station. For serious criminal cases, killing and stealing to the value of forty shillings, the procedure provided was the bringing of the culprit to England where he was to be handed over to the Earl Marshal, and on proof by two witnesses to suffer death. In effect the conditions remained arbitrary, and it is clear not only that Kirke was not too scrupulous in his treatment of his fellow proprietors, but that his grant was in derogation of that of Avalon, despite the profuse assurances given by Charles I that he would not violate that concession. The west countrymen were far too powerful to permit any serious settlement, nor was the King really satisfied that settlement was wise or desirable.

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[1] Prowse, *Newfoundland*, pp. 131 ff.

[2] Macdonald, *Charters*, p. 65.

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[1] Prowse, op. cit., p. 143.

[2] Ibid., p. 154; A.P.C. i. 192–7.

7. *Maryland*

Sir George Calvert did not live to receive the grant of Maryland intended for him, but it was conceded to his son Cecil, whose ability enabled him to turn the concession to effective use and to establish a rule which endured in his family to the revolution.[1] The land granted had been included in the Virginia area, but the proceedings of 1624 gave the King a free hand and the Virginian government was enjoined to befriend the new proprietor, whom the patent credits with the laudable desire of extending alike the Christian religion and the territories of our Empire. On him was conferred the patronage and advowsons of all churches to be built with the faculty of founding churches and causing them to be dedicated 'according to the ecclesiastical laws of England', with 'all and singular such and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities and royal rights and temporal franchises whatsoever as well by sea as by land within the region aforesaid, to be had, exercised, used and enjoyed, as any Bishop of Durham within the bishopric or County Palatine of Durham within our Kingdom of England ever heretofore hath had, held, used or enjoyed or of right could or ought to have, hold, use, or enjoy'. Saving always the faith, allegiance, and sovereign dominion due to the King, Baltimore and his heirs were made the true and absolute lords and proprietors of the territory, holding as of the Castle of Windsor in free and common soccage, by fealty only for all services at a rent of two Indian arrows and a fifth part of gold and silver ore. The estate thus created was, therefore, capable of alienation. The proprietor was also authorized to grant lands in fee simple or fee tail, to be held directly of him and not of the King, subinfeudation thus being permitted as against the English rule of law. Upon the estates which he might bestow he could erect manors with manorial courts[1] and view of frankpledge. The widest powers of government were conferred. The proprietor could legislate, whether relating to the public state of the province as Maryland was to be designated as a token of honour, or the private utility of individuals with the assent of the freemen of the province or their delegates or deputies, whom he was to summon. He was empowered to execute the laws on land and sea by the imposition of penalties extending even to life and limb, and to constitute judges, justices, magistrates, and officers of any kind he deemed desirable. The fullest power of jurisdiction in all cases, criminal, personal, real, mixed or pretorian, was conceded, as well as the right to pardon before or after judgement, 'so nevertheless that the laws aforesaid be consonant to reason and be not repugnant or contrary but so far as conveniently may be agreeable to the laws, statutes, customs, and rights of this our Kingdom of England'. In event of sudden accidents, when the freeholders or their representatives could not well be called together, power was given to make ordinances for the conservation of the peace and the better government of the people, 'so that the same ordinances do not in any sort extend to oblige, bind, change or take away the right or interest of any person or persons of or in member, life, freehold, goods or chattels'.[2] No right to review the legislation of the proprietor was reserved to the Crown, but appeals probably might be held to lie to the Crown, either on the score that appeals lay from palatinates in England or on the broader principle that the appeal was inseparable from the Crown, and could not be waived, seeing that it existed for the benefit of the subject. The proprietor was authorized to exercise the powers of a captain-general, to arm and train the citizens and use them in defensive wars; he might also in case of rebellion exercise martial law. Moreover, he was granted various minor but important prerogatives. He might grant titles of honour and incorporate cities and erect towns and boroughs. Further the King declared that he would not levy any tax or contribution on the persons, lands or goods of the inhabitants either in the province or its ports, a concession of the most generous type. The right to transport settlers and to trade was conceded with power to establish ports for exports and imports; the proprietor was granted the taxes and subsidies arising at the ports in respect of goods bought and sold and wares to be laden or unladen to be reasonably assessed by him and the people there on emergent occasion.

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[1] Macdonald, *Charters*, pp. 53 ff.

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[1] A very few were erected.

[2] This was based on the King's Ordinance power as defined in 31 Hen. VIII, c. 8 (repealed 1 Edw. VI, c. 12, s. 4), but exercised in the form of proclamations; it was condemned by the judges (1546, 1610: 12 Co. Rep. 74; 2 St. Tr. 723), and very unsuccessfully used in the colonies.

The grant of authority in this fashion to the proprietor formed the essential difference between a chartered colony and a proprietorial province. The position of the General Court as the central authority in the former was in considerable measure filled by the proprietor in the latter. It is true that the existence of an Assembly was laid down in the patent, but it was not left to the Assembly to constitute the government, appoint officers and assign them functions and arrange for the administration of justice. The proprietor had a delegation of the prerogative to rule, and the Assembly was in theory and in fact at first a subsidiary element in the scheme, its importance depending largely on the relative ability of the leaders of the freemen and that of the proprietor. An ordinance of 1637 fixed the principles of administration. The Governor was endowed with the functions of lieutenant-general and admiral, in charge of the forces of the colony, and entrusted with care of relations with the Indians. He was also chancellor, from whom issued all patents for land, licences, grants, &c., and in this capacity he was a court of equity. As chief justice, he exercised civil and criminal justice, aided by the Council when life, member or freehold were at stake. As chief executive, he had the power of pardon, save for high treason; as chief magistrate, he supervised the powers of sheriffs, constables, and justices in dealing with crime. He issued ordinances and created markets, fairs, harbours, and ports. He summoned, prorogued, and dissolved the legislature, in which he had a negative voice, while, even if he assented, the proprietor might refuse confirmation. As the Governor was often a member of the Calvert family, instructions were frequently informal, though no less binding, and official and private business were much intermingled. The Council was normally a small body at first of three members, commissioned by the proprietor, usually on the suggestion of the Governor. It advised the latter in all his official acts, and formed an important part of the government of the province. It formed also the second chamber of the legislature. At first indeed the legislature sat in one body, and there was a curious uncertainty as to the mode of composition, for the proprietor wavered between summoning individuals by name, or delegates or the whole body of freemen in person or proxy. But the preference of the freemen showed itself unmistakably for representation, and by 1650 the rule had been established that the legislature should consist of two houses, the Council and a representative Assembly. By the same time also there was decided in favour of the Assembly the issue whether it was to have initiative in legislation, or whether, as Baltimore desired, it should merely discuss laws submitted by him. The legislature, despite the proprietor's disallowance of whole batches of laws, stuck to its point, and Baltimore finally yielded with as good grace as possible.

8. *The West Indies*

Thomas Warner in 1624 established a small settlement at St. Kitts, expelling the Caribs, whose counter-attack in 1625 was defeated with the aid of a body of French settlers, who henceforth shared the island. He had acted without royal authority. By the influence of Ralph Merrifield a commission was obtained from the King for Warner to govern as Lieutenant St. Kitts, Nevis, Montserrat, and Barbados. The last named island had been visited by a vessel of Sir William Courteen, a great merchant prince, in 1625, and Warner's claim was hardly justified on its merits, for settlement was undertaken by Courteen's authority in 1627 before anything had been done under Warner's commission. Warner's position, however, was strengthened by the obtaining by the Earl of Carlisle, a royal favourite, on 2 July 1627 of a proprietary grant for the Caribbee Islands including Barbados. Courteen, as a counter-stroke, interested the Earl of Montgomery (later Pembroke), who on 25 February 1628 obtained a similar patent for Barbados, Trinidad, Tobago, and the imaginary island of Fonseca. But this patent was countered by Carlisle who induced the King on 7 April to assign Barbados to him in unmistakable terms, and who then seized the island through his Governor Wolverston. Courteen's agent, Powell, turned the tables next year, but Charles I on 28 April 1629 secured from Lord Keeper Coventry a decision[1] of an informal kind in favour of Carlisle's claim, which was enforced by Hawley at Barbados. Though the Courteen claim persisted, the wrong was never righted, and Courteen died deeply in debt in 1636.

Carlisle's patent was of the Avalon type, with tenure by Knight's service and the palatine powers of the Bishop of Durham.[2] He was authorized to legislate with the freeholders, to issue ordinances, to appoint officers, to establish courts, to pardon, to grant titles, and to erect ports, markets, fairs, and cities. The patent of 1628 assigned to him for ten years enjoyment of all export and import duties in England and the islands. The abortive patent of Pembroke was in like terms, save that the tenure was in free and common soccage as of the castle of Windsor. In neither case was power to disallow legislation or hear appeals reserved, though the latter was implicit in the palatinate status. Primary assemblies of freeholders gradually yielded place to representative bodies; Hawley summoned such an Assembly in 1639 in Barbados and from 1641 it was regularly established; in Antigua, settled by 1636, we hear of Governor, Council and Assembly legislating on social matters in 1644, probably implying a representative body, which certainly existed in 1651 under Redge in St. Kitts. Nevis, and Montserrat were settled in 1628 and 1636 at latest, and representative Assemblies existed in 1660 at latest. But the lot of the islands was hard. The duties on imports and exports were reinforced by heavy demands of dues of various kinds levied on the score of proprietary right; in 1647 in Barbados complaints were rife of arbitrary taxation, fees and fines, enforced by imprisonment, whipping, pillorying, branding, and death. Warner at St. Kitts until 1649 practised an efficient military form of government excused by conflict with the French settlers, but his hanging of a man for defaming an officer excited an émeute of 1,500 men against whom he had to secure French aid. The proprietor in return for large revenues sent out some expensive officers, provided a minimal amount of munitions, and preserved a feeble liaison with the English Court, which effected little for the luckless settlers.

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[1] Williamson, *Caribbee Islands under the Proprietary Patents*, pp. 55–60.

[2] Edwards, *W. Indies*, i. 320; C.C. 1574–1660, p. 91.

9. *The Royal Control of Trade and Navigation*

The obvious source of profit from the colonies lay in import and export dues, and these were subject to prerogative control. Parliament had granted to James I in 1604 the normal 5 per cent. tonnage and poundage, but the Court of Exchequer in *Bates's* case[1] admitted the right to add impositions, so that James I in 1608 could double the rates and virtually create a new tariff. Charles I was compelled by the attitude of Parliament to levy subsidies and imposts alike by prerogative alone, and in 1641 this power was formally denied by the Long Parliament, thus altering vitally an important prerogative, which had played a part in colonial government. The early charters normally conceded a temporary exemption from customs, and exemption in perpetuity, or 21 or 10 years, from the impositions, but this soon proved awkward and the Maryland grant requires payment of import and export duties. But exemptions became early susceptible of waiver; the King in 1620 secured Virginian acceptance of 1*s.* per lb. duty on tobacco in return for the prohibition of planting in England. This policy developed under Charles I into a system of preference for colonial tobacco, prohibition in England and Ireland, and from time to time as in 1632 even of foreign tobacco, though that could not permanently be adopted, despite its drain on bullion.

Prerogative also was used to enforce the bringing to England of colonial exports of raw material, economic motives being reinforced by dread of political independence being fostered by resort to foreign markets. The Charters indeed failed to enjoin this policy, contemplating the possibility of trade to foreign ports, but a series of royal orders from 1621 to 1639 confined tobacco exports to London; thereafter other English ports could be used. The rule was extended to all Virginian produce by orders to Harvey in 1628; in 1631 naval vessels were employed to enforce it, and from 1634 it applied to all colonial products whether brought in English or foreign ships. To enforce the orders Virginia was required in 1627 to take bonds from ships carrying tobacco to land it in England, and the colony in 1636 created the office of registrar of exports,[2] which preluded the later famous post of naval officer as a means of providing information as to exports. Virginia and Bermuda seem to have obeyed the royal commands, while Newfoundland was exempt, as its natural market for dried cod was southern Europe.

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[1] 2 St. Tr. 371.

[2] Hawley was appointed by the King and acted also as Receiver of quit-rents, a precedent followed in 1669 and later.

The policy demanded as far as possible the use of English shipping only, for foreign ships could not be relied on to observe the conditions of bonds even when taken from them in English seas by the royal navy. In 1624 James I forbade the transport of tobacco in foreign vessels, but this prohibition lapsed on his death, and the Dutch who charged less than the English soon had a strong hold on Virginia. In 1633–41 a series of instructions forbade Virginia permitting Dutch trade save in emergency, and in 1637 Carlisle was ordered to apply this rule to Barbados and St. Kitts. There is evidence that Dutch ships found it hard to obtain cargoes, and the navigation policy was clearly endorsed by the Privy Council in 1633, when it urged that trade should be carried wholly by the English and the returns made wholly into England, since thus 'his Majesty's customs and duties shall be wholly received, our own men and shipping employed, the navigation of the Kingdom increased, the plantations duly and sufficiently supplied, our merchants and planters benefited and encouraged by transportation of that surplus which now strangers carry to their own market'.[1] Efforts were made ineffectively to prohibit the export of Newfoundland fish in foreign vessels from England, which resulted in increased direct shipment and explains the authority given in Kirke's patent to levy five fish a hundred on exports thence. But prerogative was inadequate for any systematic control of trade and shipping.

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[1] Beer, *Brit. Col. Pol.* 1578–1660, p. 238, n. 4.

III. THE SUPREMACY OF PARLIAMENT AND COLONIAL AUTONOMY (1643–60)

1. *The Warwick Commission*

THE outbreak of civil war necessarily terminated the plan of the use of the prerogative to control colonial government and trade, substituting Parliamentary legislation and an executive created by Parliament. Warwick was appointed Governor-in-Chief and Lord High Admiral of all the colonies in America, and to him and a Commission was ascribed the wide power of colonial administrative control, authority to appoint and remove officers, and to delegate to them such part of their authority as they deemed fit.[1] This assertion of Parliamentary authority was followed up by further legislation implying power to control the colonies; by an Ordinance of 26 November 1644[2] exports to and from New England were relieved of duty in both territories. Such claims were not wholly acceptable even to New England, which appreciated on the whole the changed attitude of the English government towards its religious system, and felt free to put in force the Body of Liberties which it had tentatively prepared in December 1641.[3] Colonial legislation was, therefore, passed in 1645 to grant exemption from duties for English imports, thus asserting the doctrine that English laws had no automatic operation in Massachusetts. Further it was claimed[4] that 'our allegiance binds us not to the laws of England any longer than while we live in England, for the laws of the Parliament of England reach no further nor do the King's writs under the Great Seal go any further; what the orders of State may, belongs not in us to determine'. The colony in fact felt doubt on this last head; after full debate it determined not to interfere, when Captain Stagg captured in 1644 a Bristol ship in Boston harbour under an Ordinance of Parliament authorizing him to take prize, and it was thought that under the Charter they might be held to be represented in Parliament through the burgesses of East Greenwich, of which manor their lands were held, and to deny the authority of Parliament might undermine their own patent and government. Appeals to England were, however, resolutely denied, further than in justification of the colony's proceedings, but nonetheless Massachusetts could not effectively in 1646 dispute the right of the Commission to order (1646-8) that Gorton and his associates should be allowed free passage through Massachusetts to the Narragansett country, whose chiefs in April 1645 placed it under royal authority.

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[1] Stock, i. 146–9.

[2] Ibid. 140–2.

[3] Macdonald, *Charters*, pp. 72–91.

[4] Winthrop, *New England*, ii. 352.

While Massachusetts was thus asserting independence, Providence, Portsmouth, and Newport seized the opportunity to attain legal status under a patent[1] of 14 March 1644 obtained by Williams, creating the Incorporation of the Providence Plantations in the Narragansett Bay in New England. Power was given to the inhabitants to establish by agreement a form of government, to make laws and constitutions, inflict punishments and establish officers conformably 'to the laws of England so far as the nature and constitution of the place will permit'. Power was reserved to the Commission to dispose of the general government in relation to the rest of the plantations. No great haste was shown to take advantage of the patent, but in 1647–8 there came into being a general government including Gorton's home, Warwick, as well as the three towns. A representative legislature met annually; a code of laws based on English law was declared in force, no laws not included therein to be operative, while only colonial courts and officers were to exercise authority. The federal character of the constitution was seen in the rule that legislation required the assent of the towns as well as of the legislature. Executive officers were elected by the freemen each May, but did not as such form a distinct house in the legislature.

Virginia remained aloof, enjoying freedom from any control; it now disobeyed the King's orders and allowed the Dutch to trade, and provided a salary for its Governor in lieu of that promised by the King. Maryland was secured to Baltimore by his prudence in appointing a Protestant Governor and securing in 1649 the passage of a toleration act[2] of an enlightened kind. Bermuda was in some degree secured to Parliament by Warwick's influence, while Carlisle's disaffection resulted in the Commission seeking to govern the islands included in his patent directly.

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[1] Macdonald, *Charters*, pp. 91–3.

[2] Ibid., pp. 104–6. Suspended in 1654, but revived in 1658 and 1676; repealed in 1692.

They offered them the right to choose their own Governors, and exemption from all taxes save those necessary for the support of their governments if they would submit, but without evoking any enthusiastic response. An effort was made to win Barbados by restoring Carlisle to power, but it soon appeared that neither the planters nor the London merchants desired a return of proprietary rule; the former wished independence of all control, the latter Parliamentary management. Carlisle on his part introduced a new element of future importance by his grant on 17 February 1647 of a lease of the islands and governmental powers to Lord Willoughby for twenty-one years, half the profits to go to the latter, and the rest to Carlisle's creditors, but this led to no immediate result, as in February 1648 Willoughby fled to the Netherlands and declared for the King.

The control of trade passed away; the Dutch became extremely active, New Englanders traded freely in Madeira, the Canaries, Spain, and Portugal, English traders conveyed tobacco to foreign ports in America and Europe. Plans to reduce the recalcitrants were mooted in 1644 and 1646, but domestic affairs precluded action.

2. *The Policy of the Commonwealth*

Warwick's Commission was revoked shortly after the establishment of the Commonwealth and the care of colonial affairs was handed over to the Council of State by Parliament. That body, too large to be an effective executive, acted largely through Committees, standing and otherwise, including the Admiralty Committee, which was busy in 1649–50 in planning measures against Virginia, Maryland, and Bermuda. A Council of Trade[1] created by Parliament in August 1650 devoted its attention to English concerns, and its activity ceased in 1652.

The advent of the Protectorate naturally reduced the Council of State to little more than Cromwell's Privy Council. This body continued to work through Committees; one was created in 1655 after the conquest of Jamaica to consider the affairs of that island, and another was set up to deal with foreign plantations, while yet another dealt with trade and plantations. A standing committee was added on 31 July 1656 to deal with colonial affairs, including in its number men whose names were long to be associated with the colonies, such as Martin Noell and Thomas Povey. These two experts urged vainly the creation of a select Council devoted solely to the inspection, care, and charge of America, with a view to introduce greater uniformity of administration in the colonies, and to increase English shipping and revenue by engrossing the colonial trade and excluding foreigners from any share in it. Cromwell, however, was not minded to adopt any such well-defined policy, and it was left to Charles II to carry out more perfectly the organization adumbrated under the Commonwealth.

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[1] Stock, i. 215 f., 218, 225.

The execution of the King immediately resulted in the declaration of hostility by Virginia and Bermuda. Barbados hesitated, but the royalist faction under Walrond by a complex series of manœuvres intimidated the Governor, Bell, and were in control when Lord Willoughby appeared with a commission from Charles II and his patent from Carlisle. On 7 May the King was proclaimed and rebellion began. Antigua followed the lead of Barbados, but St. Kitts definitely refused to depart from the neutrality long insisted on by Warner, whose death in 1649 had been followed by the election of Rowland Redge as Governor. Nevis and Montserrat remained also neutral. Parliament was compelled to act, and passed an Act on 3 October 1650[1] which forbade trade with the four rebellious colonies. But it proceeded to insist that no foreigner could trade with America or the West Indies without licence from the English government, and it empowered the Council of State to make fresh provision for the government of the colonies, any letters patent notwithstanding. In addition to the formal assertion of imperial control, the Act, therefore, contained clauses which effectively imposed that control in matters of vital importance. The significance of the measure was veiled by the recital that it was desired to prevent enemies of the government making their way to the colonies, but the clause was permanent and unlimited in effect, and the real motive was unquestionably to strike a blow at the Dutch control of shipping with the colonies.

A year later, 9 October 1651, was passed the great Navigation Act[2] which defines and completes the system planned in 1650. No goods of the growth or production of Asia, Africa, or

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[1] Firth and Rait, *Acts and Ordinances*, ii. 425–9.

[2] Macdonald, *Charters*, pp. 106 ff.; Stock, i. 223–6.

America might be imported into England, Ireland, or the colonies save in English ships and English-manned. No European goods could be imported into England, Ireland, or the colonies except in English ships, or in ships belonging to the place of production or usual port of shipment. No foreign goods could be imported in English shipping save from the place of production or usual port of first shipment. No salted fish, fish oil, or whale fins could be imported unless caught by English vessels, and no fish could be exported from England or its dominions save by English shipping, but in 1656 this rule was relaxed, and direct shipment without duty was permitted from Newfoundland or New England. The English (not colonial) coasting trade was reserved to English owned ships. The Act of 1651 in no way superseded that of 1650, which was the chief provision affecting the colonies; it was concerned rather with England itself as well as Ireland.

The Act of 1650 was inadequate to intimidate Barbados, which totally disclaimed the authority of the Parliament in which they were not represented, and to whose commands it would be slavery to pay obedience.[1] Sir G. Ayscue, who was commissioned to reduce the islanders, found a task of great difficulty before him, and it is not surprising that it was only by a series of lucky chances that he secured the submission of the island. The terms of the submission are very interesting, for it must be remembered that Barbados regarded herself very much as an independent State, treating with an equal power. Barbados was to recognize the Commonwealth, which was to appoint the Governor, Daniel Searle being duly installed. Ports under the control of Parliament were to be opened to Barbados, and trade was to be free with all nations that traded and were in amity with England. Taxation was only to be raised with the assent of the Assembly; the estates of the cavaliers at home were to be restored. The control of the militia was assigned to Parliament. Ayscue insisted, in reporting the terms of 11 January 1652 which Parliament ratified on 18 August, that he had made it clear that freedom of trade was subject to any laws of Parliament; but the island complained that it had been defrauded when it found that the Act of 1650 was ruled to be in force and binding upon it. Ayscue also reorganized the Courts and the militia, and reduced

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[1] Harlow, *Barbados*, 1625–85, pp. 65 ff.; Stock, i. 219–28, 226–9.

Antigua, appointing Kaynell as Governor. Bermuda yielded without a fight, but in 1653 the company was reorganized and supervised by the government. Virginia in March 1652 yielded tamely enough to the commissioners of the Parliament, Richard Bennett and William Claiborne; Bennett was made Governor by the agreement of the commissioners and the Assembly, and favourable terms were granted. Parliament, however, while promising free trade[1]—which it understood as subject to the Act of 1650—refused to accept the clauses proposing to extend Virginia's limits so as to include Maryland, to provide that Virginia should have all the rights of any colony, and should only be taxed, fortified, and garrisoned with the assent of the Assembly. The commissioners proceeded to Maryland where they suspended the proprietor's authority; a confused period of intrigue followed, with the result that in November 1657 the contending parties finally agreed on a compromise under which Baltimore resumed control.

The policy of the Commonwealth soon revealed itself as demanding, on the one hand, full respect to its trade policy, and on the other as recognizing the right of the colonies as far as possible to govern themselves without control from England. Bennett's successors in Virginia were elected by the Assembly which duly accepted Richard Cromwell, but on the eve of the Restoration replaced Berkeley in office; it also erected its own Admiralty Court, but the Assembly insisted that it claimed no independent power save as necessitated by the miserable state of England. In Barbados the idea of political autonomy was prevalent. Already in 1652 Modiford[2] had mooted the idea that the colony ought to be represented by a couple of members in Parliament as a matter of propriety, but the minds of the majority of the Assembly were bent on the more important work of securing the control of the government as against the new Governor, while there were malcontents who 'had a design to make this place a free state and not run any fortune with England either in peace or war'. The Assembly was too formidable to be resisted effectively; Searle himself reported that the purpose of some was to model 'this little limb of the Commonwealth into a free state', and the Treasurer reported in 1653 that the

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[1] C.C. 1574–1660, pp. 403, 420; cf. Stock, i. 230 ff.

[2] Harlow, *Barbados*, pp. 98 ff.

Assembly had already constituted a kind of Parliamentary power, chosen themselves a speaker and so clipped the Governor's power that he has not 'a fifth part of that which all former Governors have had'. An effort was made to strengthen Searle's hands by giving him in 1653 control over the composition of his Council, hitherto nominated from Whitehall, and he managed to show a bold face to the Assembly when it presented the demand that it should be given permanence of tenure, meeting annually, and the old Assembly only being dissolved on the meeting of the new. The colony traded freely with the Dutch, but this was ended by the arrival in 1655 of Admiral Penn with the expedition fitted out for the attack on Spanish possessions in the West Indies and America. The expedition was in itself little of a success, though it added Jamaica to the Empire. But it served to reduce Barbados to a more exact observance of the navigation laws, and the supreme power of Cromwell was seen in the supersession for the time of Searle as Governor by Venables, who commanded the land forces, and the appropriation by Cromwell's authority of two-thirds of the excise duties for the expedition. Venables' departure home finally enabled the control of military affairs to be resumed by Searle, who had been reappointed for three years. Cromwell's determination to carry out his own policy was, however, seen in his grant of the office of Provost Marshal-General in 1657 to William Povey in defiance of the rule that offices in Barbados were in the gift of the Governor and Council, but Searle was able to secure through the aid of Martin Noell and Thomas Povey the cancellation in 1658 of an order for the restoration to office as judge of a personal rival, Colleton. Finally in 1660 the colony seemed to have won a great success. Modiford, who had long been intriguing, was named as Governor, and a promise given that the Council should in future be elective, one member from each parish. With a planter Governor and an elected Council, Barbados had thus attained a proud position of autonomy, though the commission commanded obedience to the Act of Trade and the Act of Navigation. But the Restoration checked, though it did not extinguish, the movement.

Yet it was clear that the trade policy of the Commonwealth was not really consistent with the idea of colonial autonomy. In that policy the determination to persist was testified by the insistence of Cromwell in securing a recognition of its validity from Holland and Denmark in the treaties of 1654, and Sweden had in 1656 to admit the validity of the general rule of exclusion while obtaining a promise of licences for Swedes on special recommendation by their King. The Acts may not have been always observed, but there are cases of seizures in Barbados, St. Kitts, Nevis, Montserrat, Virginia, and Maryland. But the obedience of Virginia was reluctant; in 1660 it broke down, the ports were opened to all ships of Christian nations, and a treaty made with New Netherlands for commercial intercourse. Massachusetts was still more recalcitrant. It objected firmly to any attempt to alter its government and rejected the suggestion of a new charter. During the Anglo-Dutch war of 1652–4 it asserted, as did the other New England colonies, its independence by legislating specifically to exclude Dutch shipping, while Massachusetts in 1653 forbade the sale of provisions to the Dutch and French colonies. Massachusetts permitted any ships of nations in amity to trade, and the unwary Captain Leverett was lucky to escape being accused of treason when he seized a Dutch ship in 1655 without the consent or allowance of the government, which voted his action an infringement of its liberties and destructive of its well being. Rhode Island[1] permitted in 1657 trade with the Dutch, and in 1658 only yielded so far as to permit seizure of ships by express and especial commission from the State of England or by authority of the legislature. Connecticut in 1660 expressly disclaimed in correspondence with New Netherlands any intention of keeping out Dutch trade: ‘We have not in our colony any orders to the contrary.’

Colonial export trade was not formally restricted to the mother country, nor were ships forbidden to take on cargoes of European manufactures at foreign ports for export to the colonies. But the rule as to shipping unquestionably operated to confine exports to England, and Virginia showed its feeling by imposing in 1658 and 1660 a surtax of 10 shillings on tobacco exported to places other than England and its dominions in Europe. The Bermudan tobacco crop was sent to England, and the royal policy of preference for colonial tobacco, and prohibition of tobacco growing in England, was followed. Imperial authority was exercised in 1649 to forbid import into the colonies of French woollens, silks, and wines in retaliation for French prohibition of entry of English silks and woollens. On the other hand Virginia defied the English policy of equality of treatment of English and colonial shipping, providing in 1656 and 1660 exemption for her shipping from castle dues and the surtax on tobacco exported to foreign destinations.

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[1] W. Coddington in Apr. 1651 obtained from the Council of State a commission as Governor of the island, but Williams secured its revocation in 1652 and the island reunited with Providence and Warwick in 1654.

Newfoundland profited especially by the new régime. Kirke's activities fell under suspicion, commissioners were sent in 1652 to supervise matters, and in 1653[1] John Treworgie was authorized to enforce a code of rules based on the Privy Council Charter of 1634. He remained in office until the close of the period, and settlement profited from this beginning of more orderly government.

3. *The New England Confederacy*

The measure of autonomy won by the New England colonies in this period is best attested by their action in creating a loose confederacy. As indicated in the instrument[2] of 1643 creating the United Colonies of New England, their motives were complex. The dispersion of the people over a vast area rendered defence difficult, the relentless extermination by Connecticut of the Pequot Indians in 1637 increased the danger of Indian counter-attack; the colonists were intruding on the area claimed by the Dutch, and the presence of the French, though at a distance, was a menace. Common interest in religion worked for unity; it was at a synod in 1637 that the idea was mooted; fear of Massachusetts prevented Connecticut accepting overtures in 1638, but risk of Indian war resulted in 1642 in a change of heart and in agreement at Boston in May 1643 between Massachusetts, Connecticut, New Haven, and Plymouth. Rhode Island in 1644 and 1648 was refused admission unless on merger with Massachusetts or Plymouth, which she declined. The disorders in England, which prevented the colonies seeking advice and obtaining protection, were adduced as the excuse for the remarkable step of federation without royal assent. The colonies formed a league in perpetuity for offence and defence and mutual succour in matters spiritual and temporal. The territorial and governmental integrity of each was recognized; no new member could be admitted nor could two members unite without the assent of all. The machinery of co-operation was composed of eight commissioners elected by the General Court of each colony, who met annually in September or when required; the place of meeting was to be in succession in the several colonies, Massachusetts having two visits in each series. With the commissioners lay the duty of deciding on war, offensive and defensive, on peace, and alliances. Any colony could aid another if attacked, while all must, if three magistrates of any colony demanded; but payment depended on the decision of six commissioners at least, failing which recourse must be had to the General Courts. When decided upon, the cost was divided according to the number of males between 16 and 60 in each colony, spoils being shared similarly; the mode of raising its contribution was left to each government. The normal quota of forces was fixed at 45 from the minor colonies to 100 from Massachusetts. Other matters for the commissioners were the maintenance of peace between the colonies, the rendition of runaway servants and fugitive offenders, migration, Indian affairs, including such matters as the supply of liquor and munitions, and the conduct of judicial proceedings. If any colony broke any article or injured another, the other six commissioners were to take measures to secure peace.

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[1] Prowse, *Newfoundland*, pp. 167 ff.; C.C. 1574–1660, pp. 403, 411, 415 f., 443.

[2] Macdonald, *Charters*, pp. 94–101; Egerton, *Federations and Unions*, pp. 103–11.

In certain matters the union achieved accord; Harvard College was supported, the Society for the Propagation of the Gospel in New England, created by the Council of State in 1649, was aided in its efforts to evangelize the Indians which came to an end with Philip's War (1675–6). There was unhappily agreement in repression of the Quakers, though Massachusetts alone carried into practice the compact of 1658 for the banishment and execution on return of these sectaries. Some success was achieved in 1645 in extricating Massachusetts from her rash intervention in the dispute over Acadia between Charles de la Tour and d'Aunay, and in arranging for peace between the Mohegans and Narragansetts, while a provisional boundary was fixed with Peter

Stuyvesant in 1650 which the States General ratified, but which the English government declined to confirm, refusing to admit any Dutch right to settle. But the superior power of Massachusetts prevented her acquiescing in decisions of the majority and thus weakened the pact. She refused in 1647 to accept the ruling of the other three colonies in favour of the right of Connecticut to levy tolls on the trade of Springfield, which lay outside its jurisdiction but profited by the fort at Saybrook, and, by imposing countervailing duties on goods of the other colonies passing through Boston, forced Connecticut in 1650 to yield. She refused also in 1653 to co-operate in the attack contemplated by Connecticut and New Haven on the Dutch, maintaining that the compact could not mean that an offensive war could be ordered without the assent of her General Court, though in 1654 she abandoned that doctrine, the peace having removed its cause. She claimed also in 1648 that the basis of contribution was unfair in view of her large number of poor labourers and artisans, that triennial meetings of the commissioners would suffice, and that advice given by them might be disregarded, all propositions which the other colonies refused to admit.

The Restoration struck a severe blow at the union, for the Charter of Connecticut united New Haven with it, without the assent of the other colonies. The constitution was remodelled in 1667–72, effect being given to this change and to the wishes of Massachusetts. Triennial meetings were arranged; war required the assent of the General Courts; and the quotas were fixed at 100 for Massachusetts, 60 Connecticut, and 30 Plymouth. A few formal meetings were held, and Philip's War produced some activity, but the cancellation of the Massachusetts Charter in 1684 ended the union.

IV. THE RESTORATION AND THE CENTRALIZATION OF AUTHORITY (1660–88)

1. *Imperial Organization and Policy*

CHARLES II inherited from the Commonwealth a rather trying burden of complex issues. The New England colonies were all but independent; Jamaica was conquered, but its form of government was yet unsettled; Nova Scotia was in English hands, but its return was demanded by France; Newfoundland was in dispute, and the Caribbee islands remained to be disposed of. Petitions poured in and were referred to Committees of the Privy Council; thus in 1660 the Caribbee issue was carefully dealt with by one body, the Jamaican by another, and in 1661 special committees deliberated on New England and on the French demand for Nova Scotia. The duty of carrying out decisions in the Council was in considerable measure performed by the Secretary of State, Sir E. Nicholas, to whom the business was assigned. But there was abundant room for an expert body, and Thomas Povey and Martin Noell renewed the advice they had vainly tendered to Cromwell. It was now taken, and on 1 December 1660 a formal commission was issued creating a Council for Foreign Plantations. Its membership included Clarendon and Anthony Cooper as well as the Secretaries of State; prominent colonial officers like Sir W. Berkeley, and experts like Povey and Noell. The Council was instructed to render the dominions useful to England, England helpful to them, to introduce a more uniform method of government, to secure the observation of the Navigation Act, and to dispose of matters relating to colonial government with power to apply to the Privy Council for further powers. Almost contemporaneously a Council for Trade was created, whose members were often members also of the Council for Foreign Plantations. The two Councils commenced well, but they soon ceased to attract the full attention of their members. Their functions after all were merely advisory, power resting with the Privy Council, and at the close of 1664 their activity ceased. The Privy Council had now to work with the aid of its own committees. In 1668 four such committees were established, for foreign affairs, for military affairs, for petitions and grievances, and for trade and plantations. To the functions of the latter, strengthened by the Attorney-General or King's Advocate, was assigned the hearing of petitions from Jersey and Guernsey.

The Privy Council, however, found the aid thus afforded inadequate, and in 1668 a Council for Trade was revived, colonial trade falling within its sphere. In 1670 a Council for the Colonies came into being.[1] Its number was small as compared with that of 1660, and its members were paid, the total cost reaching £6,500. It was instructed to develop trade in the colonies, and in 1671 was in theory strengthened by the addition of a number of great officers and noblemen, with Evelyn as a salaried commissioner. In 1672 it was empowered to act as a Council for Trade and Plantations. Shaftesbury became its President, and its Secretary in 1673 was John Locke. Its work was conscientiously done, meetings were frequent, complaints and memorials from the colonies were sedulously examined, and information on colonial conditions accepted from all with experience, local or English, of the conduct of colonial relations. The instructions to be given to Governors were carefully prepared, and colonial legislation scrutinized. Special issues were examined in detail, such as Spain's protests against the cutting of logs in Campeachy Bay by Jamaicans, the creation of a distinct government in 1671 for the Leeward Islands, or the difficulties with New England. But the Council had no executive powers, for its reports were merely suggestions to the Privy Council, and it suffered, therefore, from the same defects as marked the later Board of Trade (1696–1782). We find Lynch when Governor of Jamaica beseeching the Council and the Secretary of State for instructions on the logwood issue, but only receiving directions after grave delays. The lack of executive power as well as its cost explains its abolition on 21 December 1674. Danby, now Lord Treasurer and head of the ministry, was perhaps also prejudiced against a body whose moving spirit had been Shaftesbury. The work now devolved on the Privy Council's own Committee for Trade and Plantations, to which the issues of Gorges' and Mason's claims against Massachusetts and the Newfoundland question were referred. On 12 March 1675 Charles II formally named a committee and appointed nine members to the immediate care of the affairs, requiring a weekly meeting and directing that Sir R. Southwell, one of the clerks of the Privy Council, should be in regular attendance. Under this officer's care the Committee developed a permanent organization with clerks, a regular journal of proceedings and systematic filing of papers for record, the absence of which was noted by a contemporary critic as a serious defect under the Council. On its clerical staff, and later Secretary, was William Blathwayt, whose influence was long important in colonial affairs. The Committee instructed and corresponded direct with the Governors, and from its position it was able to avoid the delays of the older system. In 1686 its membership numbered forty, and in 1688[1] James II ordered all the Lords of the Privy Council to be a standing Committee for Trade and Foreign Plantations, but the work of course was carried out by lesser numbers, comprising the great officers of State who were its real effective members.

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[1] For its instructions see Andrews, *British Commissions, &c.*, pp. 117 ff.

There is no doubt that in the latter part of the period the existence of the Privy Council Committee in full authority greatly simplified the task of government, and enabled Charles II and James II to develop their policy of centralization and enforcement of royal authority in the colonies as a necessary part of the plan of securing the economic interdependence of the various parts of the Empire. The régime of the Commonwealth had taught the monarchy that Parliament could provide the means of laying down commercial policy with far greater effect than was possible under the vague prerogative powers of controlling trade, which could hardly be deemed likely to prove efficient after the period of their disuse. But at the same time the Crown possessed the prerogative of colonial administration and judicial authority with a share in legislation, and it was held possible by the free use of these powers to give effect to the trade policy enacted in the Navigation Acts when it was realized that these measures were not efficacious unless administered accurately and honestly.

Royal policy, however, was swayed by personal considerations and thus lacked steadfastness. The Council for Foreign Plantations in 1661[2] in its desire for the effective administration of the laws of trade advised Charles II to resume the existing proprietary governments and to create no new colonies of this type, and in 1682 the Lords of Trade laid it down,[1] in connexion with the request of Robert Barclay for a grant of East New Jersey and the Earl of Doncaster for one of Florida, 'that it was not convenient for His Majesty to constitute any more proprieties in America or to grant any further powers which may render the plantations less dependent on the Crown'. Yet in 1660–70 six charters were granted, creating almost independent governments in Carolina, New York, the New Jerseys, and the Bahamas under proprietors, and in Connecticut and Rhode Island under companies. Nor is it easy to defend the grant of Pennsylvania to Penn in 1681, though at least care was then taken to insert conditions in favour of the Crown. For the Carolina experiment some excuse may be found in the character of the proprietors, who included Clarendon, Lord Berkeley, and Sir William Berkeley, Ashley and Colleton, and the King's chronic lack of funds which compelled him to neglect opportunities of Imperial development by governmental action. Penn again profited by his relations to the King and the Duke of York, which doubtless prevented the Lords of Trade from blocking his request.

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[1] C.C. 1685–8, no. 1607.

[2] C.C. 1661–8, no. 3.

The growth of the Imperial importance of the colonies was accompanied by the development of the problem of their defence. The state of the English exchequer assured reluctance[2] on the part of the government to undertake any expenditure that could be avoided, and the greatest repugnance was shown to take steps involving any Imperial burden. If the rebellion in Virginia compelled the dispatch of a force at heavy cost in 1677, it was rapidly withdrawn, and in 1682, despite the appeal of Culpeper and the support of the Lords of Trade, the Privy Council insisted on disbandment, which had been enforced, despite the protests of Sir Henry Morgan in 1680 in Jamaica, where since the conquest, in view of the danger from the natives and Spain, a small force of two companies had been maintained. As early as 1670 Bridge's regiment was ordered to be disbanded in Barbados, the Assembly objecting that its services were not necessary in time of peace, though two companies were raised from it and maintained in St. Kitts when recovered from French hands in

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[1] Andrews, *Col. Self-gov.* p. 264.

[2] A.P.C. i. 847 f.

1671. The only other military force in any way aided from Imperial funds was the small garrison in New York towards which £1,000 was paid by the King. Even this slight obligation was disclaimed in 1688 on the addition of New York to the Dominion of New England, and the doctrine was thus established that for military defence the colonies must look to their own militia at any rate as against any but European enemies. In naval defence the colonies were not expected to be capable of self-sufficiency, but, while ships were dispatched from England for the protection of the West Indies against the French and the Dutch, they obtained very important assistance from Barbados, and it is significant that both Lords Willoughby actually took command on occasion of the naval forces, impressing merchant vessels for service in carrying colonial troops.[1] Though the New England colonies declined to afford any aid in the English project of 1666 for a combined operation against Canada, Massachusetts aided by supplies the Barbadians in the struggle for the Leeward Islands, and the buccaneers in Jamaica were effective allies in harassing Spain until she consented in 1670 to peace on fairly satisfactory terms. Local effort was also fostered by royal gifts of arms, guns, powder, and shot, and advice and even money grants for fortifications, to a total of over £50,000 in 1660–85. Errors were doubtless made, as when in 1677 pikes were supplied to Barbados in place of firelocks, and Virginia was induced to locate her fort at Point Comfort in an indefensible position, but the royal government was well meaning if parsimonious.

The issue of defence played a part in inducing the Crown to seek to secure standing revenues from the colonies, rendering it needless to depend on the whims and submit to the control of the Assemblies, and substantial success was achieved in this direction in the West Indies and Virginia. The appointment of a Surveyor and Auditor-General in 1680 in the person of William Blathwayt, with powers to appoint deputies in the colonies, to control the receipt of royal revenues[2] marks a definite stage in the attainment of the King's purpose.

The unfortunate side of this effort to secure colonial revenues independent of Parliament was seen in the decision in 1682 to abandon Tangier, which, acquired as part of the dowry of the Queen, had an interesting military and municipal[1] history.

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[1] Harlow, *Barbados*, pp. 165 ff., 185 f.

[2] See ch. xi, § 8.

Ecclesiastical policy accepted toleration, but Clarendon seems definitely to have revived the suggestion of Laud of the creation of a bishopric. A patent was drafted about 1666 to create a diocese of Virginia, and to place under the care of the bishop all Anglican churches in Jamaica, Bahamas, Bermuda, and the other colonies outside New England, and in 1673 the appointment of Alexander Murray as bishop was discussed. But the project never matured, to the lasting disadvantage of the Church of England in the colonies in a spiritual sense.

2. *The Navigation Acts*

Charles II, inspired by Clarendon, Shaftesbury, Arlington, and the time-server Downing, was determined to secure the fullest development of English navigation and trade. Economic thought was largely dominated by the views effectively expounded by Josiah Child, and with more moderation by Charles Davenant. Emigration was no longer desired, for it was not believed that there was over-population; men were needed at home to maintain the national strength against France and other rivals. Political offenders, nonconformists, criminals, alone could well be spared as emigrants, and the idea of an expansion of English rule by free settlements was abandoned in favour of the development of tropical colonies by slave labour, to control which some small number of emigrants might be justified, since thus raw materials might be provided for English workers and a market provided for English manufactures and surplus provisions, horses, &c. The southern mainland territories and the islands, therefore, were attractive to English politicians; the Carolinas were expected to yield wine, silk, currants, oils, and olives; Penn aspired to produce oil, figs, dates, almonds, raisins, and currants; Virginia and Maryland sent tobacco. The imperfect economic ideas of the time laid weight on the high customs levies on such imports as tobacco and sugar, erroneously supposed to fall on the producer, but in any case advantageous to the exchequer even in case of re-exports when drawbacks of three-quarters duty on tobacco and half on sugar were allowed. The exchequer profited also by the small export dues on English exports and the difference between the dues on foreign imports and the drawbacks allowed on re-export.

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[1] E. M. G. Routh, *Tangier*; Chalmers, *Opinions*, i. 178. It had a Mayor, Recorder, Aldermen, and Commonalty, electing 12 councillors, all Christian; the Mayor, Recorder, and Aldermen had civil and criminal jurisdiction save over persons in garrison pay, and in 1728 a similar constitution for Gibraltar was seriously considered; J.C.T.P. 1723–8, pp. 442–7.

The northern colonies were in little favour. Child denounced New England as the most prejudicial of plantations, a competitor in the fisheries, exporting of its own resources only a few masts, furs, and train-oil, and in the main tobacco, sugar, and cotton procured from other colonies in exchange for provisions which England would else have supplied, and using its own shipping as well as selling ships abroad. Davenant saw more clearly, recognizing the necessity to the tropical colonies of a source of supply of lumber, provisions, and horses at cheaper rates and more certainty especially in war than England, while New England offered an increasing market for English clothes, woollen goods, handicraft wares, furniture, &c. Moreover it was obvious that, if the colonies were not English, they would probably become French and sever the connexion between Newfoundland and the south. Nor did they need population from England; New England and Virginia saw a rapid increase of population, and Barbados and Bermuda under the substitution of cultivation of sugar by slave labour for petty holdings had many white emigrants to spare.

New York again was taken possession of largely for military reasons and to consolidate the British dominions, but the action was also strongly motived by the desire to increase the economic value of Virginia and Maryland, which was gravely lessened by the illegal trade between these colonies and the Dutch settlement.

In any case, however, the value of the colonies was by common agreement dependent, in the view of Davenant no less than that of Child, on their being kept rigidly within the system of English trade. The navigation laws were thus an essential part of English policy, accepted as just on all hands except where individual interests were affected, and in these cases the objections urged rested merely on private losses and were not put forward on any convincing grounds of general advantage. The planters of Barbados for instance objected to the acts, but merely because their circumstances rendered them irksome, and the great weight of opinion told definitely in their favour. It was only in the stress of the revolutionary period that voices began to be raised energetically against the acts; men like Otis and Adams clearly had no real fault to find with them as regulations of trade.

It is proof of the general acceptance of the theory that the famous Navigation Act of 1660,[1] the Charta Maritima as Child styled it, passed in less than a month the House of Commons practically unopposed. Much of the Act deals with the importation of European goods into England; by means of prohibitions and discriminations English shipping was given a marked advantage in this matter without entirely cutting off foreign shipping. In this advantage colonial shipping shared, for the privileges of English shipping were extended to colonial built ships, and the provision that English shipping must be manned by an English master and a crew three-quarters English included colonial subjects. This doctrine of the parity of English and colonial shipping dominated English legislation; it was departed from only in an insignificant provision as regards the Greenland whale fishery in 1673, and the practice contrasted effectively with the colonial habit of seeking to differentiate against English shipping. Hence colonial ships could carry fish to Europe, and there take on board merchandise for English ports, where again they could load cargoes for the colonies. English shipping was further given a monopoly of importation of produce of foreign holdings in Asia, Africa, and America, but only from the place of production; an exception was allowed in that Spanish and Portuguese colonial produce might be brought from Spain or Portugal. As English shipping was normally forbidden access to foreign colonies, the rule operated as a means of favouring English colonial produce in the English market.

The colonial import and export trade was specifically restricted to ships belonging to the people of England or Ireland or built in and belonging to the plantations in Asia, Africa, and America. The master and three-quarters of the crew must be English in the wide sense of the term. Foreign built ships of English ownership, though not of colonial ownership, remained free to undertake the trade under this Act, but in 1662, though such vessels were allowed to remain in the trade, their cargoes had to pay the additional aliens' duties which made their use normally unprofitable, and in 1696 all right to use such vessels disappeared. As usual, dispensations were occasionally granted from the letter of the law, but it was enforced in colonial courts; thus in 1686 the Nevis Admiralty Court condemned an Irish ship, the *O'Brien*, because it was of foreign build, though later rebuilt in Ireland. Colonial ships, if purchased from foreign owners, were deemed unfree and so also foreign vessels condemned in the colonial courts. By an ingenious device Jamaica and some other colonies reckoned such ships as 'free within the tropics', but this practice was absolutely condemned as illegal by the Commissioners of Customs in 1687, and orders given to recall the certificates issued by the Governor of Jamaica. The penalty for use of an unfree bottom was condemnation of ship and cargo; the proceeds went, if the capture took place in a colony, one-third to the Crown, one-third to the Governor, and one-third to the seizer or informer; if the capture were effected by a royal naval vessel the Crown received one-half and the officers the other, a fact which was a source of considerable friction between colonial and royal officers. By a reasonable exception, allowed specifically in several treaties, foreign ships in distress were allowed to refit in colonial harbours, to purchase necessaries and sell sufficient goods to cover expenses. Otherwise they traded at their peril, for in 1685 the English government ordered the seizure of all vessels belonging to strangers and foreign vessels, not made free, found trading there.

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[1] 12 Chas. II, c. 18; Stock, i. 277–82.

A further protection against foreign trade was furnished by the rule that all aliens were forbidden from acting as merchants or factors in the colonies. The rule was strictly enforced, and local naturalization, which was then not rarely granted by act of the legislature or authority of the Governor to confer the status of a denizen, was not regarded as possessing more than local validity, as was held in a case arising at St. Kitts in 1682 by North C.J. But annexation created in inhabitants of the annexed territory the status of English subjects, a rule which explained the differentiation made in 1671 and 1691 in favour of Jewish and Dutch residents of New York. The rule raised difficulties in 1685 for the proposed settlement of French Huguenots, since their ship would have been liable to forfeiture and they themselves could not act as merchants or factors under pain of forfeiture of their property.[1]

Finally the Act contained, at the suggestion of Downing, a most important provision, reviving the efforts of the Stuarts by the prerogative to compel the shipping of colonial products to England only. Under penalty of forfeiture of ship and cargo no sugar, tobacco, cotton-wool, ginger, fustic or other dyeing woods produced in a British colony could be shipped except to England, Ireland, or another British colony. A legal opinion in 1698[2] ruled that the full forfeiture applied only when a bond had been given in England by the master, and that, if the bond were given locally, only the sum specified therein could be exacted. Any ship leaving England or Ireland for the colonies was compelled to enter into a bond for £1,000 or £2,000 according as the vessel's burden was under 100 tons or not, to bring any of these enumerated products to England or Ireland; if a vessel arrived at a colonial port from England or Ireland it had to produce a certificate of the bond to the Governor. Any ship authorized to trade arriving from any other place must enter into the bond with the Governor; to load without entering into a bond or showing a certificate meant forfeiture. But ships arriving elsewhere than from England or Ireland were privileged, for they could carry the goods to other English colonies, though this advantage was at first not appreciated, and English or Irish ships were for a time allowed a like privilege despite the terms of the Act. From 1685, however, the rule was enforced that only ships not from England or Ireland could engage in the carrying trade as regards enumerated products.[3] The products enumerated were overwhelmingly of West Indian origin, save that Virginia and Maryland were affected by the rule as to tobacco; New England had no products which England wished to have sent to her.

One lacuna remained in the system which was now to be filled up. English and aliens alike were still free to send foreign manufactures direct to the colonies in English shipping, and England thus lost the advantage of forming the head-quarters of the trade and drawing duties. The Act of 1663[4] expressed admirably the purpose of the whole system: 'in regard his Majesty's plantations beyond the seas are inhabited and peopled by his subjects of this his Kingdom of England, for the maintaining a greater correspondence and kindness between them, and keeping them in a firmer dependence upon it, and rendering them yet more beneficial and advantageous unto it in the farther employment and increase of English shipping and seamen, vent of English woollen and other manufactures and commodities, rendering the navigation to and from the same more safe and cheap, and making this Kingdom a staple not only of the commodities of those plantations but also of the commodities of other countries and places for the supplying of them, and it being the usage of other nations to keep their plantation trade to themselves'. The motive of revenue does not directly appear, but it is mentioned in the Act of 1673, though in fact by reason of drawbacks the amount thus accruing to the Imperial exchequer was not large. The importance of regular communications can hardly be under-estimated nor the claim of the English government to consideration on this score. From 1670, when it decided to put down piracy and the happy days of Jamaican adventure ended, it was assiduous in seeking to secure the safety of the seas. Far more important in some ways was its long series of treaties with the Barbary States; Algiers (1662–86), Tunis (1662), and Tripoli (1662 and 1676) were induced to concede immunity not only to English but also to colonial ships if manned by a majority of English subjects. Even so, Virginia and Massachusetts had to deplore losses, and we have the personal narrative of the sufferings of Seth Sothell, one of the Carolina patentees who was captured in 1679 when *en route* to govern North Carolina.

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[1] Carpenter, *Am. Hist. Rev.* ix. 288–304; Start, *Am. Hist. Ass. Rep.* 1893, pp. 317–39.

[2] Beer, *Old Col. Syst.* i. 74, n. 1.

[3] A.P.C. ii. 88.

[4] 15 Chas. II, c. 7; Stock, i. 310–20.

The Staple Act prohibited under the usual penalties of forfeiture the importation into the colonies of any European goods which had not been first imported into England, and then laden and shipped there. As in the case of enumerated goods mere bringing into port was not enough; the goods must be actually unladen and put on shore, paying customs dues, and such small extras as town or wharf dues. The requirement was often neglected but also frequently enforced. Commodities, whose importation into England for consumption was forbidden, might be sent to the colonies via England. Moreover, salt for Newfoundland and New England where it was used in the fisheries could go direct, since otherwise their fishermen would have been badly handicapped in the struggle with foreign rivals for the markets of southern Europe. From Scotland and Ireland provisions, horses, and servants could be exported, a concession intended to aid planters in the West Indies, who vainly asked for greater freedom of trade with these territories. Wine from the Madeiras and the Azores, territories of England's ally Portugal, could also be carried direct; in the case of the Spanish Canaries opinions differed, but Sawyer S.G. in 1686 and Northey in 1706 agreed in holding that the Canaries were in Africa and that trade thence was not forbidden.[1]

To render effective the terms of the Navigation Acts it was now provided that any importer of goods into a colony must within twenty-four hours deliver an inventory to the Governor or an officer appointed by him, and any master must before unloading deliver an inventory of the lading showing the places of loading, and prove that the ship was English built, on pain of forfeiture of the ship and all European goods not loaded in England. The Governors also were required to take oaths to observe the rules laid down in the Act on penalty in case of wilful violation of removal from office, ineligibility for any other government, and forfeiture of £1,000. At the same time it was provided definitely that enumerated goods from the colonies must first be landed in England, thus excluding direct carriage to Ireland.

The Act of 1660 soon proved defective in two vital points which are officially recorded in the preamble to the amending Act of 1673.[2] In the first place the enumerated products were carried frequently to other colonies and not to England, and were there very lightly taxed or not taxed at all, so that English consumers were decidedly worse off than colonial consumers, which was unfair. Secondly, not content with this advantage, the colonists in flat defiance of law carried the goods thus received to Europe or sold them to foreign shipping which did likewise, with the result not merely of loss to the revenue, but also to the injury of English merchants who could not successfully compete with this direct trade, seeing that only part of the duty which they had paid on importation was refunded on exportation to Europe. The New Englanders were the chief culprits, for they procured tobacco and other commodities and carried them, defying the Act, to Europe. In vain the Committee of Gentlemen Planters who cared for the interest of Barbados in London protested that the New England trade was innocuous and raised the objection that Parliament could not 'levy a tax on those that had no members in the house'. Parliament insisted on providing that, if any vessel should lade the enumerated goods or coco-nuts without giving a bond to take them to England, it must pay specified duties, white sugar 5*s*. per cwt., brown 1*s*. 6*d*. per cwt., tobacco 1*d*. per lb., cotton-wool ½*d*. per lb., indigo 2*d*. per lb., ginger 1*s*. per cwt., logwood £5 per cwt. (? ton), fustic and other dyeing woods 6*d*. per cwt., and coco-nuts 1*d*. per lb. The rates were based on the old subsidy granted by Parliament in 1660 on imports into England, but that on tobacco was only half the English impost. The purpose of the Act was clearly that, even if there were transhipment, the duties must be paid, though Northey A.G. in 1715 ruled that the duty need only be paid when goods were sent from colony to colony for sale and not merely in process of shipment to England. It was never intended that the duties should yield any substantial revenue; they were imposed for the regulation of trade and to force export to England only. What was vital, moreover, was that even if the duty was paid the goods when received in the other colony could not be shipped direct thence to foreign markets, a rule insisted on by the English government in 1676[1] and re-enacted in 1696.

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[1] Beer, *Old Col. Syst.* i. 79. So F. Fane, 3 Feb. 1737 (Chalmers, ii. 275 f.) Contra a New York Admiralty Court, 1704.

[2] 25 Chas. II, c. 7 (29 Mar. 1673); Stock, i. 398–400.

Scotland, of course, as a distinct dominion of the King and not of the Crown, was not regarded as an English possession, and trade with it was strictly limited. The Navigation Act of 1660 treated Scottish shipping as foreign, the Staple Act allowed only servants, provisions, and horses to be carried direct thence, and the enumerated articles under the Act of 1660 could not be taken to Scotland. In vain were appeals made to England, and an attempt at retaliation carried out under a Scottish Navigation Act.[2] At most a few dispensations were allowed, and Barbadian appeals for a direct trade were sternly negatived. It was claimed also at first that Scotsmen could not be reckoned as English subjects within the provision of the manning clauses of English ships nor allowed to act as merchants and factors in the colonies. Parliament seems to have desired as regards manning to have made this clear by enacting in 1662 that the term English was to be restricted to 'any of his Majesty's subjects of England, Ireland and his plantations'. But, though ships were seized on this score in Barbados in 1670 and in South Carolina in 1687, it was clear that the Act had failed of its purpose. The Scots in 1683 in New Hampshire claimed that they were born within the allegiance and therefore English subjects, and Hawles S.G. in 1698 admitted that, as a result of *Calvin's* case, this was the legal effect, so that the right of the Scots to rank as English under the Navigation Act could not be denied.[1]

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[1] C.C. 1675–6, pp. 337, 350.

[2] Stock, i. 445–7.

Ireland was a dominion of the English Crown and Irishmen were unquestionably English subjects, and at first it was intended to ignore the fact that Ireland was a rival kingdom as well as a possession and to treat it on the footing of a plantation. But this policy disappeared under the Act of 1663 which restricted direct export from Ireland to servants, provisions, and horses, and—what was far more serious—forbade, albeit in very obscure terms, the taking there of the enumerated products. In 1671 this was enacted in set terms, eliciting protests from Ireland which were sternly rejected on the score that, were direct shipping allowed, Irish and European manufactures would soon be sold to the prejudice of English trade. The law, however, was largely evaded until in 1678–80 the Admiralty was authorized to make seizures of vessels on this score. In 1680, however, the Act of 1671 lapsed, having been temporary, and exportation to Ireland became legal. Under the Act of 1673, however, duties were payable in the colonies on such exports of enumerated products, and N. Badcock, Surveyor of Customs in Maryland, was clearly right in 1681 when he demanded duties of £2,500 on tobacco laden on ships which, under their bonds given in England, were bound to convey the tobacco to England or Ireland. Baltimore and his Council intimidated the Surveyor, whose action was upheld by the Crown, and Baltimore was severely reprimanded and ordered to repay the sum lost, as well as threatened with proceedings to vacate his charter.[1] Efforts to collect were not, however, very successful, and a compromise for a time was reached under which half the duty was levied in Ireland and none collected in the colonies. The scheme, however, ended in 1685,[2] when the prohibition of 1671 was enacted in absolute terms, and Irish protests were met by the unanswerable argument that direct trade was all to the benefit of Ireland with its chief stores of provisions.

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[1] Beer (*Old Col. Syst.* i. 90–1) is in error in thinking this a case of common law overriding Statute. It is merely that the Statute used a term which included Scots as a matter of law.

Dispensations were rarely accorded, the most regular being the leave given to Spanish vessels to trade to the English West Indies for slaves. During the two Dutch Wars permission was given to employ foreign vessels in the colonial trade, but these permits were occasioned merely by the necessity of using seamen for war purposes and were revoked at the conclusion of hostilities.

The enumeration rule made the import duties of England a matter of prime importance to colonial traders. The tariff of 1660 accorded very generous preferences on sugar, tobacco, cotton, indigo, and ginger, and the colonies enjoyed very great benefits which must be set off against the restrictions imposed. The taxation naturally fell on the English consumer, the colonial producer merely losing some measure of sale as a result of the tax. On the other hand, he paid ultimately the tax on enumerated goods re-exported to European markets, though large drawbacks diminished the burden, and the colonial consumer paid the small and unimportant taxes on English exports, and the more important duties on foreign manufactures sent via England, though in these cases also drawbacks were given. To the colonies, however, the increase of duties on their staples seemed a very serious matter, and a keen controversy arose in 1671 over the proposal to raise additional revenue from sugar and tobacco.[3] There were cross-currents of interest, the merchants trading to Portugal and their allies, the English woollen manufacturers, were eager to avoid any interference with their Portuguese business, such as was menaced by increased duties; the English refiners aimed at securing low duties on raw sugar, but high on other kinds; the English merchants trading to the West Indies objected to refined sugar being imported as it diminished profits

[1] C.C. 1681–5, pp. 58, 59, 65, 87, 151, 157, 195 f.; A.P.C. ii. 28–31.

[2] 1 Jas. II, c. 17; 22 & 23 Chas. II, c. 26, ss. 10, 11.

[3] Stock, i. 377–97.

from shipping, and the colonies desired low duties, a minimal difference between taxation on raw and on refined sugar, and prohibitory duties on foreign sugar. The Barbados planters secured from the Lords a reduction in the duties proposed which was deeply resented by the Commons as a breach of privilege and the bill dropped. In 1685,[1] however, by Dudley North's advice James secured from Parliament for eight years heavy additional taxation of tobacco and sugar. Dire prophesies of disaster were uttered on behalf of the colonies, but their fears were diminished by the policy of refunding the additional duties on re-export, and in due course the protests subsided as far as tobacco from Maryland and Virginia were concerned. Barbados, however, secured the dropping of the additional charges on sugar on their expiry. Moreover, in the interest of the colonies, the prohibition of planting tobacco in England was provided for by Parliament in 1660, and a prolonged and desperate process of resistance was finally beaten down, by use often of armed force, by 1690, a fact which must be set down in favour of England.

3. *The Enforcement of the Navigation Acts*

The Navigation Act of 1660 resulted in the immediate connexion of the English Treasury and its subordinate branch, the Commissioners of Customs, from 1671, with the colonies. It fell to the officers of customs to carry out the essential duty of requiring bonds from vessels leaving England regarding the carriage of the enumerated goods. Where ships eluded their vigilance, the Treasury were ready to command the Governors to seize the delinquent ships on arrival. To the customs again Governors were required to send twice a year lists of bonds taken from ships carrying the enumerated goods when bonds had not already been given in England, and English officials in foreign countries were prepared to report to their superiors instances of the arrival of English ships with colonial produce. The Commissioners of Customs were given by the Act of 1673 control of the duties on enumerated exports, and by 1686[2] they could assert that the whole body of the Navigation Acts was under their care, and that it was their duty to maintain uniformity of system. They prepared instructions for local officers, and at times were instructed to send directions to the Governors, as when in 1684 they were required by the Privy Council to instruct the Governors to prosecute in any case where a bond given locally had been violated. They were insistent on securing information as to infractions of the laws from foreign representatives of the Crown, and the Admiralty was asked from time to time to co-operate by seizing foreign vessels violating these laws.

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[1] 1 Jas. II, c. 4; Stock, i. 426–31.

[2] C.C. 1685–8, pp. 187 ff.

In the colonies the Acts imposed definite obligations on all the Governors, including those of the proprietary and chartered colonies. But there was no great eagerness on the part of any of these officers to fulfil their part, and the Imperial government took long to insist even on the oaths required being taken. In 1668, 1672, and 1675 the issue was mooted, and in 1676[1] instructions were sent to the colonies bidding them, as in 1663, obey the laws of trade, and a form of oath was at last devised and in 1677–8 administered to the royal Governors. Governors naturally could not look after the detailed work, and this devolved on the clerk of the naval office or naval officer, who by that name first occurs in the great Act of 1696 but who was known locally much earlier, as for instance in Jamaica in 1665. On this office devolved such duties as taking of bonds, examination of ships' papers and cargoes, and the entrance and clearance of vessels, for the King was insistent on the regular supply of these details, and in the West Indies from 1680 on the duty was fairly well carried out. At first the appointments were made by the Governor, but on second thoughts it was decided to reserve these appointments, though local in character, to the King. This was insisted on in 1676 in the case of Langford in Barbados, despite the angry protest of the tactless Governor Atkins, and shortly afterwards applied to Jamaica, and later extended to all royal colonies. The plea put forward by the Secretary of State, Sir Henry Coventry, was that the King was determined to know better those by whom he was served, but this excellent intention was frustrated by the habit of permitting the exercise of office by deputy.

It was, however, fairly clear that local officers were not exactly adequate for the occasion, and the farmers of the customs early protested against the loss they suffered from the laxity under which tobacco was freely sent to the Dutch in America and to Europe. A plan for them to send out officers to counter illegal practices was approved in 1664, but the conquest of New Netherlands rendered actual dispatch needless. But the relaxation of the Acts during the Dutch war was accompanied by laxity on the part of the Governors who allowed unqualified ships to trade and enumerated goods to be shipped without bonds, and on a recommendation of the Council of Trade in 1669 the farmers of the customs were enjoined to station officers in the colonies to administer the requisite oaths to the Governors and see to the carrying out of the Acts. In 1671, before much could be done, the farming of the customs was abandoned and Commissioners appointed, who proceeded to carry out the scheme on an effective basis. E. Digges, who had been chosen in 1669 by the farmers of the customs and was also auditor, was appointed agent in Virginia, and the Governor was ordered to co-operate with him in enforcing the law, while Governor Calvert in Maryland was given a similar delegation. In 1673, however, a change was made, as the new Act imposed directly on the Commissioners the duty of collecting the duties imposed. Collectors were appointed to all the colonies save North Carolina, New York, and New Jersey, where appointments were made in 1674, and New England which remained immune until the appointment of Randolph in 1678. Normally one collector sufficed for each colony, but in 1676 the agents of Virginia persuaded the government to appoint seven, and in 1685 Maryland was divided into two collectorships. As a check on the Collectors, it was normal to appoint a Comptroller and Surveyor-General, who, though subordinate, countersigned the collector's accounts. In 1683 a new officer appears, the Surveyor-General of the Customs in America, a post first held by William Dyer, whose activities made him unpopular and who was succeeded in 1685 by Patrick Mein. These officers received pay from the Imperial customs establishment, while in most colonies the collectors and comptrollers were granted the greater part of the revenue which they collected under the Act of 1673. In New England, where that revenue would have been negligible, Randolph's pay of £100 was charged to the customs. In Barbados and the Leeward Islands the control of customs was united with the duty of collecting the 4½ per cent. export duties belonging to the Crown. Minor officers included clerks, searchers, watermen, and waiters whose cost was defrayed from the allowances made to the collectors.

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[1] C.C. 1675–6, pp. 365–71, 381; A.P.C. i. 365–7 (24 June 1663).

It was inevitable that the duties of the collectors as imperial officers should result in clashes with the local governments. The customs authorities expected their officers to do much more than was laid down in the Act of 1673. They were expected to see that ships arriving from England had duly given bonds there, and that other ships were compelled to take out bonds, to seize ships violating the Staple Act, and not to allow any ship to land before it had handed in a report and manifest. It is clear that this programme involved the view that vessels must enter and clear with the collector, while at the same time the Governor could not carry out his duties unless they entered and cleared with the naval officer. Berkeley in Virginia therefore attempted to reduce the collector, Giles Bland, to the function merely of collecting the plantation duties of 1673, and, when Bland protested, he was suspended from his office. Not unnaturally he took part in Bacon's rebellion and later suffered death for his share, but, on the main point, his contention prevailed, and in 1683 the royal governors were instructed that ships should enter and clear with both the collectors and the naval officers.[1] The dual system was found to work not badly, and to afford a check on both sets of officers; it was in many colonies complicated by the fact that, as local customs duties were imposed, it was necessary to enter and clear with provincial revenue officers as well, but the confusion was mitigated by the fact that in some colonies the offices were combined in the same hands. Nevertheless in 1694–5 the Commissioners of Customs still reported that they had failed to carry out their desire that the collectors should also be appointed naval officers. It remained the specific and exclusive duty of the collectors to raise the plantation duties, while the naval officer was charged with requiring bonds from ships arriving from non-English ports.

The efforts of the Imperial customs officers would have been less effective than even was the case had it not been for the aid rendered by Vice-Admiralty Courts and the exertions of the Royal Navy, both under the direction of the Imperial Admiralty. The Act of 1660 expressly authorized commanders of ships of war to seize foreign ships trading with the colonies and

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[1] C.C. 1681–5, pp. 477 ff., 549, 565 f.; 1685–8, pp. 289, 291.

'to deliver them to the Court of Admiralty there to be proceeded against', the ship and the Crown sharing equally the value of the condemned vessel.[1] If seized in a colony, presumably by the civil authorities, the trial was to be in a court of record and the division threefold to the Crown, Governor, and seizer or informer ,and penalties for violation of the enumeration clause were to be recovered in a court of record. Violation of the Staple Act could be met by proceedings in any of his Majesty's courts in the place where the offence was committed or in any court of record in England. Did a court of record in the Act of 1660 include a court of Admiralty? The presumption was that it did not do so, and in 1688 in Jamaica a Dutch ship was condemned by a special commission rather than attempt trial in the Admiralty Court.[2]

Admiralty Courts had been created during the Interregnum in the West Indies in order to condemn prize-of-war and foreign ships violating the Act of 1650. The Act of 1660 rendered a continuance of such jurisdiction necessary, but the office of Lord High Admiral granted in 1660 to the Duke of York was extended in 1662 to cover English possessions in Africa and America.[3] Windsor's commission, therefore, as Governor of Jamaica in 1662, empowered him to cause courts of Admiralty to be held by judges commissioned by the Duke. On the other hand, Willoughby in 1663, as Governor of Barbados and the other Caribbee islands, was given power as Vice-Admiral to execute martial law and expel all intruders, and as High Admiral to constitute courts for marine purposes. This error was rectified in future commissions, as in that to Modiford in 1664 and to Lynch in 1671; they were created Vice-Admirals with power to establish Admiralty courts, but their power was to be exercised according to commissions, directions, and instructions from the Duke of York, who issued to them his commissions as Vice-Admiral.[4] Thus Admiralty Courts came into being under the Duke's commissions in Jamaica in 1662, in Barbados in 1663, in the Leeward Islands when created a separate government in 1671, and again in 1677 when the deputy Governors were appointed judges of Admiralty in the several islands. When New Hampshire became a royal colony in 1679 its Governor was made Vice-Admiral and an Admiralty Court established. The same thing happened in Massachusetts in 1686; prior to that Admiralty causes had been tried under an order of the General Court in 1674 by the Court of Assistants without a jury unless it desired otherwise. In New York Andros as Governor had a commission as Vice-Admiral, but in 1678 he reported that jurisdiction in such cases had been exercised by special commission or the Mayor and Aldermen of New York. In Virginia, though Howard of Effingham had a commission as Vice-Admiral, the seizures made by naval officers in 1686 were tried by the General Court or County Courts with juries. Connecticut acted through the Court of Assistants as did apparently Rhode Island, while Plymouth sent prizes to a royal Admiralty Court, having no jurisdiction of this kind of its own.[1] Bermuda entrusted such cases to the Governor and Council, but on the revocation of the charter an Admiralty Court was set up. Maryland claimed the jurisdiction for the proprietor, and an Admiralty Court was set up in South Carolina. Barbados also in 1669 and 1681 used a Court of Exchequer for revenue cases. The appointment of judges, registrars, marshals, and advocates was normally left to the Governor, who might himself sit as judge as Dutton did in 1682. Appeals at this time were held not to lie to the High Court in England, but though Jamaica in 1673 repudiated the right of any appeal, the King sometimes permitted appeals to the Privy Council as in the case of the *O'Brien* condemned at Nevis for seeking to import candles direct from Ireland, though not an English ship.[2] Admiralty Courts acted even in revenue cases without juries, whence they were preferred by naval officers, and even on occasion by civil governments, Morgan in 1680 pointing out that juries were untrustworthy, one having held that candles imported from Ireland were provisions.

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[1] That only the High Court of Admiralty was meant was held by Northey 21 Aug. 1702 (Chalmers, *Opinions*, i. 188), and the Barbados Council in 1661 (C.C. 1661–8, no. 84). Northey and West in 1720 (Chalmers, ii. 211 f.) held that even the Act of 1663 gave no colonial admiralty jurisdiction. Cf. C.C. 1685–8, pp. 303, 356 ff.

[2] C.C. 1685–8, p. 621.

[3] C.C. 1661–8, no. 245.

[4] C.C. 1661–8, nos. 259, 478, 615, 656, 664, 1389.

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[1] C.C. 1677–80, pp. 576–8, 522–4, 393 f.; 1685–8, pp. 451 ff.

[2] C.C. 1669–74, p. 527; A.P.C. i. 649; C.C. 1685–8, pp. 257, 268, 365, 378, 381 f., 384, 398.

The use of Imperial naval forces to enforce the Acts became marked in 1685 when they were instructed to seize vessels guilty of any violations of the Acts of Navigation, the Commissioners of Customs in 1686 giving the commanders delegations to remove legal objections raised in Massachusetts to any action not authorized by the Act of 1660. St. Lo of H.M.S. *Dartmouth* and Talbot of H.M.S. *Falcon* patrolled the West Indies, while at Lord Howard of Effingham's request Allen in the ketch *Quaker* watched the Virginian and Maryland coast, being aided in 1686–7 by Crofts of H.M.S. *Deptford*. The latter was accused of dishonesty and of oppressive conduct to his officers; Allen [1] denied Howard's right to call his action in question on the latter score as being matters for the King or a Court Martial, not for a Governor and Council, but on the former charges Crofts was recalled and removed.

Enforcement of the laws of trade was, even in the royal governments, a complex and difficult task; in New England the lack of control over the colonial authorities added tenfold to the task, and inspired a policy of aggression against their constitutional rights which was only frustrated of fruition by the English Revolution.

4. *Virginia*

Charles II's treatment of Virginia shows him in his worst light, for there is little trace of any constructive plan until 1680, and Virginian interests were postponed to considerations of personal friendship. In 1669 he renewed to St. Albans the grant of the Northern Neck, the land between the Rappahannock and the Potomac with manorial rights, and power to constitute counties and cities, churches and parishes, though Virginia was to possess legislative control and to hear appeals from manorial courts.[2] The grant did not prove effective in the hands of the grantees, but in 1673 [3] Charles II gave to Arlington and Culpeper all Virginia for thirty-one years with power to dispose of land, receive quit-rents, enjoy jurisdiction under the Northern Neck grant, create local government areas, erect manors and churches, and appoint sheriffs, surveyors, and other officers. The colony, by the efforts of its delegates at London, secured the withdrawal by the patentees of claims save to quit-rents and escheats,

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[1] C.C. 1685–8, pp. 466 ff.

[2] C.C. 1669–74, pp. 22–4.

[3] A.P.C. i. 810; C.C. 1669–74, p. 334.

Arlington in 1681 yielding his share to Culpeper, whose claim was at last compromised for an Imperial pension of £600 for twenty years, save as regards the Neck, and in 1679 and 1681 Charles II promised that the quit-rents would be applied for the service of Virginia in future. In the discussions an interesting proposal nearly became operative: Virginia was to obtain a charter of incorporation[1] in order to buy out the patent for the Neck, to be declared dependent directly on the Crown to the exclusion of proprietary rights, to be exempt from any taxation save by Parliament or the local legislature, and to be free from further prejudicial land grants. But the completion of this project was thwarted by events revealing grave defects in the government. Under Berkeley, restored to office by election, and royal approval, in 1660, the tendency to oligarchy had progressed. The Governor's salary was derived from the 2*s*. a hogshead duty on tobacco which was collected under the Assembly's control, but the legislature was in entire harmony with the Governor, and in 1662 restricted the popular element in the vestries by making them in future co-optative, while in 1670 it restricted the franchise to freeholders. The control by the justices of county levies, the lavish grants to Governor and Councillors, and the expenses of the Assembly, created popular unrest, which broke into something approaching revolt when the administration failed to meet an Indian war. In the result the Assembly had to be dissolved, a new Assembly was elected, and command was given to Nathaniel Bacon, who had won distinction in Indian warfare. Obscure intrigues resulted in semi-civil war, but Bacon's sudden death on 18 October 1676 gave victory to Berkeley, who, with the aid of a new Assembly, savagely punished his rivals, thirty-seven being executed, while the Assembly repealed the measures of reform of its predecessor which had restored the plan of elective vestries and the wider franchise, though it withdrew exemption from taxation from councillors and associated a representative element with the justices in imposing levies.

To check reaction Charles II dispatched a Royal Commission of three members who had hard work to induce the maddened Governor to leave the colony, to escape punishment for his crimes by an early death. They insisted, however, on making peace with the Indians[1] on whom a protectorate was imposed, under which they accepted the royal authority but were guaranteed lands, hunting, fishing, and oyster grounds, and protection from molestation or intrusion by white settlers. The Commission invited representations, but found few serious grievances other than the poll tax; they reported the unfavourable influence of the disregard in Maryland and Carolina of royal authority, and advised the maintenance of a small garrison, though the bulk of the force sent with them was at once returned home. The King resolved to assert his authority and as in Jamaica to control legislation,[2] partly doubtless because of the severity of the Act of Attainder passed by the Assembly of 1677. Unhappily the new Governor chosen to enforce the policy was Culpeper, a *persona ingrata* to the colony and himself indifferent to the task. It was proposed to introduce the system of Poynings' Act into Virginia, so that the Assembly was only to be called with special royal authority and to be allowed to pass only such bills as had been submitted by the Governor to the King and received his assent in advance. The Governor was to be controlled by having the Councillors named in his commission, while he was forbidden to remove officers save for good cause, and was only to regulate fees which must be moderate with the assent of the Council. Culpeper made no attempt to secure acceptance of the system of Poynings' Act, but he induced the Assembly in 1680 to pass three Bills as drafted in England, one granting an indemnity, one providing for naturalization—much desired in the colony—and a third granting a permanent revenue of 2*s*. a hogshead on tobacco, 1*s*. 3*d*. on tonnage, and 6*d*. a head on immigrants, though the Assembly insisted on exempting Virginia-owned or built ships. The Act was confirmed on 14 October with the omission of this proviso, but it is clear that the omission was ineffective, as the King's power was merely to disallow *in toto*.[3] Culpeper's indifference led to his removal and the appointment of Howard of Effingham, who engaged in a feud with the legislature, the two houses of which now were separated. The Burgesses complained that he refused assent to Bills which had been passed in Council where he still sat, declined to give the Governor and Council temporary power to impose levies when the Assembly was not in session, demanded accounts of the revenues under the Act of 1680, and claimed that fees and forfeitures should be spent on the province, nor would it pass a militia measure. It was dissolved in 1686, but the new legislature of 1688 complained of the disallowance of an Act of 1682 against attorneys, of new fees,[1] of arbitrary imprisonments, of dismissals, of the admission of Papists to office and failure to impose the oath of supremacy. Howard returned to England to meet these charges, which he succeeded in refuting in 1690, being permitted to remain as titular Governor on half pay.

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[1] A.P.C. i. 636 ff.

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[1] A.P.C. i. 734 ff.

[2] A.P.C. i. 808 ff.

[3] C.C. 1677–80, pp. 555, 568, 612–14; 1681–5, p. 153; A.P.C. ii. 11. Ruled invalid by Law Officers, 1707 (Chalmers, i. 357–9).

5. *Maryland*

The Restoration destroyed the settlement just achieved by the Assembly[2] through Fendall, Baltimore's Puritan Governor, under which the Governor and Council sat with it, and it could be dissolved by the Speaker alone. Baltimore's power, now reasserted, was effective through the aid of a family clique, which controlled the Council, the higher offices, the land system and militia, managed elections through the sheriffs, and named the Speakers. In 1669 he compelled the Assembly to expunge an attack on his government and disallowed a batch of Acts of six years' standing; not until 1681 did he make even the concession that when, out of the province, his decision on Acts would be pronounced in eighteen months. His position was secured by an Act of 1671 imposing a tax of 2*s*. a hogshead on tobacco, of which a half was to go to defence; thus the practice of appropriation in detail by the Assembly did not hamper his independence of its will. His absolute power was lessened by the enactment of the Navigation Act of 1673, for it heralded the appearance of Imperial officers. Hitherto the Acts had been objected to but obeyed lest worse might befall, and Charles Calvert was at first as Governor sufficiently trusted by the Crown to be allowed to act first as Surveyor and then as Collector of Customs. On succeeding his father he secured the appointment of Christopher Rousby. The quarrel between him and Rousby has been referred to already; Badcock, the Comptroller, whose insistence on payment of duty on tobacco exported to Ireland was the prime cause of the proprietor being reprimanded by the Crown, doubtless had ground for his assertion that 'my Lord and his government almost think themselves out of the verge of the King's sovereignty'. Worse was to happen, for, when Baltimore left the colony in 1684, his representative, George Talbot, visited the royal ketch *Quaker* and not merely disputed with Captain Allen the authority of the royal officials, but murdered in passion the Collector Rousby. For this offence he ultimately was condemned by the General Court of Virginia, but the King commuted the sentence to five years' banishment. The murder was followed by the refusal of Maryland to recognize the commission of N. Blackiston, the Comptroller who claimed to act in the place of Rousby, and much loss ensued, resulting in instructions to the colony to assist Blackiston as Collector and to refrain from collecting the plantation duties of 1673, while general instructions were once more sent to the colonies demanding compliance with the laws of trade. Baltimore's recalcitrance was punished by the issue in 1685 of a *quo warranto* against his patent, and in 1686 the prosecution of the writ was ordered, but nothing had been accomplished by the Revolution.[1]

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[1] A.P.C. ii. 142 f.

[2] Osgood, *Am. Col. in 17th Cent.* ii. 84–7.

6. *The Carolinas*

When the Virginian Charter was vacated in 1624 it left the King free to re-grant the lands which it had covered, and in 1629 he made to Sir R. Heath, Attorney-General, a grant of the area between 31° and 36° N. lat., under the style of Carolana, but this grant was never developed, and accordingly it was without difficulty that on 24 March 1663[2] he granted to Clarendon, Albemarle, Craven, Berkeley, Ashley, Sir G. Carteret, Sir W. Berkeley, and Sir J. Colleton of Barbados, the vacant area. The new proprietors were doubtless well meaning, but the venture was from the first unwise; the proprietors were busied rather in English affairs, they had little expert knowledge, death soon introduced new members, and the whole policy of the body was marked by vacillation and uncertainty. The Charter granted followed the type of Maryland, and gave the widest powers of government and legislation with the aid of the freemen or their delegates, while ordinances might be made when inconvenient to summon the freeholders, but not so as to take away any person's right in freehold, goods, and chattels. A special clause provided for religious toleration, and the purpose of the settlement was indicated by the fact that permission was given for seven years to import into any part of the royal dominions wines, silks, currants, raisins, capers, wax, almonds, oils, and olives from Carolina. A further area was added by a second charter of 30 June 1665,[1] which repeated the terms of the first and may have been motived by desire to remove any doubts as to claims under Heath's patent. In the same year a remarkable set of concessions[2] was issued in order to attract certain Barbadians who were willing to settle on the basis of an agreement with the proprietors. These concessions, if they had been given full effect, would have created a state of affairs resembling that attained about 1750 in the northern colonies. They proposed to make the Assembly, elected from freeholders by the freemen, the centre of power. It was to sit annually, adjourn itself and appoint place and time of meeting; pass laws; levy taxes and provide for expenditure; create courts and determine their jurisdiction, officers, and fees; create baronies and manors; erect forts and establish cities, create counties, hundreds, and parishes; and provide for defence. The Governor and Council were to carry out these laws faithfully. The colony, however, established in view of these concessions, proved a failure, and a completely new note appears in the Fundamental Constitutions[3] of 1669 issued on the initiative of Ashley and John Locke. This amazing document appeared in five versions, two in 1669, of which the second is usually regarded as the final form, two in 1682, and the last in 1698. The proprietors throughout this period sought to have the Constitutions accepted as the basis of government, the settlers revolted against the proposal, demanding that they should be allowed to enact as law any change in the constitution as proposed in 1665. Unfortunately for Locke's reputation it is necessary briefly to note the proposals. The eldest proprietor was to be palatine, and the others treasurer, admiral, chamberlain, chancellor, constable, chief justice, and high steward; each was to have a court. The palatine's court, consisting of the proprietors, was to control appointments, pardons, and the calling of Parliament; each of the other courts was to consist of a proprietor and six counsellors, and to deal with a branch of business, executive and judicial. The proprietors and counsellors were to form a grand council. A nobility was to be created of landgraves and caciques;[1] the proprietors or their deputies, the nobles, and one representative from the freeholders of each precinct were to constitute Parliament, the electors having a 50-acre freehold, the elected 500 acres. Voting was to be by the four orders, and business was to depend on the initiative of the grand council; acts must be ratified by the palatine and three proprietors. Meetings were to be biennial and, except that it could vote taxes, its powers were expected to be strictly minimum. The putting in force of this amazing document would have created a mass of baronies, signories, and manors, and a network of feudal courts and jurisdictions, and it must suffice to note among its absurdities the rule that no comment should be allowed on the Constitutions or any part of the common or statute law, that all laws were to expire after a hundred years, that it 'shall be a base and vile thing to plead for money or reward', that every freeman shall have absolute authority over his negro slaves, and that no person above seventeen should have protection of law whose name was not entered as member of some church.

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[1] C.C. 1681–5, pp. 85, 157, 160–5, 735; 1685–8, pp. 30 f., 61, 74–6, 173, 188. 213, 216; A.P.C. ii. 28–31, 88–92.

[2] Macdonald, *Charters*, pp. 120 ff.

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[1] Macdonald, *Charters*, p. 148.

[2] N. Car. Records, i. 77 ff.

[3] Macdonald, pp. 149–68.

In fact in 1669 a mutilated version of the Constitutions was put in force. The Governor, Sayle, was given a Council of five nominees of the proprietor and five elected members, while there was to be a parliament of twenty members elected by the freeholders, whose acts required the assent of the Governor and three of the proprietor's representatives, sole right of initiative resting with the executive. In 1671 the first Parliament met and the curious system lasted for some twenty years. The Council had its elected members appointed by Parliament for an indefinite period, removable by the proprietors; in this way there was a link between the Council and the Parliament; it prepared bills for that body, expended the taxes voted by Parliament, levied military forces, and concluded treaties with, or declared war against, the Indians. The deputies of the proprietors, for their part, exercised also the functions of the palatine's court.

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[1] The titles granted were dropped in 1719–29. Justice seems to have been administered in the King's name.

They could call and later prorogue or dissolve Parliament; expend any moneys not specifically appropriated, elect to offices, pardon offences, erect forts, and negative proposals of the grand council or the Assembly, and assent to legislation. With the Governor, the deputies formed a majority on the grand council, and Shaftesbury held that the Governor had no power substantially greater than any other deputy, his position being rather a thing of order than of overruling power. In 1682 a concession was made to attract Scottish Presbyterians desirous of escaping the tender mercies of Claverhouse and the Duke of York; the grand juries might submit proposals of legislation if action were not taken by the Council; if the Council still refused to move, Parliament could act without its initiative. Little came of the proposed settlement, but in this year local government was tentatively begun. Again under Colleton in 1686–8 the attempt was renewed to secure the adoption of the Constitutions; the Assembly refused and denied the Council the right of initiative, whereupon it was dissolved and Colleton provoked anarchy by rigorous enforcement of quit-rents, prohibition of trade with the Indians, and suppression of all hostile discussion. Order was restored by the advent of Seth Sothell, who had acquired Shaftesbury's share and acted as Governor from 1690–1, when he gave place to Ludwell.[1] The fight was now nearly over, for the elective element in the Council now disappeared, and the way was ripe for the definite concessions under Thomas Smith, his successor in 1693, of the initiative both to the Council and the Commons House of Assembly, as the elected members are now called, showing that the legislature had now assumed bicameral form.

In the meantime in the north of the area the Albemarle settlement had seen a similar evolution. In 1665 the first Assembly seems to have met; another in 1669; later it was reinforced by a Council of ten members, half elected, while the territory was divided into four precincts, each returning five representatives. A lurid light is thrown on its disregard for the laws of trade by John Culpepper's rebellion in 1677, which was the outcome of the effort by Thomas Miller, as collector of Customs and acting in room of the Governor, to divert the trade of the colony from

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[1] He was the first to govern both north and south, the former by deputy, a system prevailing up to 1712.

New England to the mother country and to enforce the navigation laws. He is, however, also said to have altered the electoral law and to have imposed severe fines. At any rate he was arrested by Culpepper and others, who presumed to call an assembly and refuse admission to the Governor on his arrival, while Miller was imprisoned. Escaping to England, he had Culpepper arrested there, and tried for treason under the statute of 35 Henry VIII, c. 2, regarding treasons abroad; Shaftesbury, however, saved his friend by the ingenious argument that there was in effect no real government at Albemarle, so that Culpepper could not have been guilty of more than rioting. Whether recompense was ever made by Culpepper is not recorded; what is clear is that anarchic conditions were prevalent.[1] Seth Sothell, appointed to restore order, was captured *en route* by pirates and only arrived in 1683. His rule, until he was expelled in 1688, was one of corruption and arbitrary action; he was charged with unlawful imprisonment, with detention on false charges of piracy, with the seizure and conversion of private estates, with refusal to admit a will to probate, and with taking bribes. His wrongdoing resulted in his trial by the General Assembly, which banished him for a year and debarred him for ever from holding the Governorship.

Naturally under these circumstances no attention was paid by Albemarle to the enforcement of laws of trade; indeed Sothell's chief claim to the forbearance of the people seems to have lain in his care not thus to offend their susceptibilities. A very large trade continued to be carried on with New England and no serious amount of the plantation duties was raised. Moreover, as Lord Culpeper observed in 1681, the colony 'is and always was the sink of America, the refuge of our renegades, and till in better order is a danger to Virginia'. Lynch, Governor of Jamaica in 1684, roundly accused the colony of harbouring pirates, and though an Act was passed in 1685, it neither was nor could be executed and the Secretary of the province was suspected of being in league with pirates. It is not surprising that in 1686 the Attorney-General was ordered to take proceedings under *quo warranto* for the vacation of the Charter. The case was strengthened in 1687 when Muschamp, collector of

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[1] A.P.C. i. 875 f., 881 ff.; C.C. 1677–80, pp. 372 f., 478; 1681–5, p. 155.

Customs, reported [1] that in the Admiralty Court he had failed to win a case and the Court had asserted that Carolina was entitled by the Charter to trade freely with Scotland and Ireland, and that the natives of these countries could transport their own products and manufactures to Carolina in ships manned by Scots. This monstrous claim was energetically disapproved by the Attorney-General and the proprietors hastened to disclaim it, and in the general failure to proceed with the writs of *quo warranto* occasioned by the revolution the Charter was saved for the moment.

7. *Pennsylvania*

It is difficult to regard as well judged the action of Charles II in acceding to William Penn's request of 1680 for the grant to him of the territory which was to bear his name. Penn had already shown his practical interest in America in his connexion with Jersey, and it was natural that he should seek a wider outlet for his energies, but the grant of proprietorships had shown in the case of Maryland and Carolina sufficient disadvantage to render a fresh creation unwise. Nor was the scheme expressly approved by the Lords of Trade. The Charter, however, was carefully scrutinized by North C.J. and its terms were intended to safeguard far more fully than any earlier Charter essential royal rights. The Charter of 4 March 1681 [2] is noteworthy in that it reflects the disappearance of the Palatinate of Durham as an entity, apart from the inappropriateness of conferring on a Quaker ecclesiastical authority which he could not desire to exercise. But Penn was made absolute proprietor holding in free and common soccage as of 'our Castle of Windsor', yielding two beaver skins and a fifth part of gold and silver ore in the approved style. His powers were the usual palatinate powers, but he did not desire the right of creating titles which, exercised as it had been in Carolina, had not attracted wide approval. The usual power of legislation with the freemen or their deputies was accorded, and the right to make ordinances in emergency, but not to bind persons in life, members, freehold, goods or chattels; it was expressly provided that, until altered by law, the English laws of tenure and descent of real and personal property and felonies was to obtain. Complete power to establish Courts was given, and to pardon, save in cases of treason and malicious murder, when respite only might be accorded. In order to secure that there might be no departure from the faith and allegiance owed by Penn and his fellow-subjects copies of Acts were to be sent home within five years to the Privy Council, which might then advise the King within six months to declare them void as contrary to that faith or allegiance or inconsistent with the King's sovereignty and lawful prerogative. So also from all judgements of the province appeals might be allowed by the King. The commercial clauses were not exactly in the older form. Authority was given to transport produce of the colony to England only, paying the usual custom dues, with right to re-export within a year to other English or foreign territories. The proprietor was to establish ports to which free access was to be given to the officers appointed by the Commissioners or Farmers of Customs in England. The proprietor was granted the customs and subsidies of the ports (saving such as might be imposed by Act of Parliament), the amounts to be assessed by him and by the people there. Further, an attorney must be kept at London to answer for any misdemeanour or wilful neglect of the laws of trade; if he should fail within a year to pay any damages awarded on this score, or if no attorney were kept for a year, then the province might be resumed and retained until payment. In external matters the proprietor was forbidden to entertain any relations with a prince at enmity with the King, and conversely he must not make war on any prince in amity with the King. Further, the King renounced absolutely any right to tax lands, tenements, goods, or chattels, save with the assent of the proprietor, or the Governor and Assembly, or Act of Parliament. An assurance was further given that, if any twenty of the inhabitants desired to have a preacher approved by the Bishop of London, he should be permitted freely to reside in the province.

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[1] C.C. 1685–8, pp. 353 ff., 425 f., 451 f.; A.P.C. ii. 92; C.C. 1681–5, pp. 642, 645 f.

[2] Macdonald, *Charters*, p. 192.

The trend given to this constitution depended, as in the case of Carolina, on the personality of the grantee. Penn was not a profound thinker, but he had an excellent knowledge of the commonplaces of the political ideas of his time and he was far less of a pedant than Locke. The fundamental principles recognized by him were three: liberty of person and ownership of freehold property; the voting of laws; and an influence upon, and a real share in, the judicatory power in the execution and application thereof. Hence from the outset in the First Frame of Government[1] which Penn prepared in discussion and agreement with intending purchasers before leaving England, we find the same principles as he enunciated in the Second Frame of 1683[2] after experience in the province, and in the final Charter of Privileges of 1701.[3] The government was to vest in a Governor and the freemen organized in a Provincial Council and a General Assembly. The Governor was given three votes in the Council as the appointee of the proprietor, but no veto on the Council or Assembly, while the Council was to be elective, and to be composed of seventy-two members, one-third retiring annually. The Assembly was in the first instance to include all freemen, but thereafter to be composed of 200 representatives. To the Council was accorded the fullest executive power; four committees were to be created: plantations, justice, education and arts, and trade and finance. To it alone was granted initiative in legislation, and the power to summon and dissolve the General Assembly. That body was allowed to impeach wrongdoers, and accept or reject bills, for the elective character of the Council rendered it impossible, in Penn's view, that it should be a deliberative body; perhaps he hoped that his councillors would really be chosen as first in wisdom, virtue, and ability, and thus be more trustworthy than the Assembly. The Charter attempted to make itself a constitutional norm, by forbidding amendment without the assent of the proprietor and six-sevenths of the freemen in the Council and the Assembly, while it was to be binding on the proprietor himself. The ballot was prescribed for elections, and it was proposed that judicial officers should be chosen by the Governor from double the number of suitable persons presented by the Provincial Council or the freemen in the county courts.

In point of fact the first Assembly summoned at the close of 1682 was composed of a single chamber of forty-two members elected by the six counties, and it legislated simply and effectively, passing an act for union with the three Lower Counties acquired by Penn by grant from the Duke of York[4]—the later

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[1] Macdonald, *Charters*, pp. 192 ff.

[2] Ibid., pp. 199 ff.

[3] Ibid., pp. 224 ff.

[4] Penn's power to govern was never formally admitted by the Crown.

Delaware—and agreeing to a code of sixty-one laws prepared by Penn in England, after examination of a considerably larger number. For the next legislature the model of the Frame was proposed; but, on petitions engineered by himself, it was agreed that the seventy-two elected members should make up one-quarter the Council, the rest the Assembly, which at once asked for but was refused an initiative in legislation. The Frame, however, was amended in important details. The Council was reduced to eighteen members, a third retiring annually, the Assembly to thirty-six; a third of the Council was to serve as advisory to the Governor in all matters relating to justice, trade, treasury, or the safety of the province, its assent being necessary for any act of State. The Governor's triple vote disappeared, and bills proposed by the Council were to be published twenty days before the meeting of the Assembly. The arrangement was not happy; in 1685 and 1686 the two houses bickered over the initiative, and attempts to impeach Moore and the clerk of the Council, and it was in vain that Penn attempted to restore harmony by the rather absurd device of appointing four additional members to aid the officer whom he had left to act in his place. Nor did success attend the device of sending out Blackwell, a Puritan, to struggle vainly with Council and Assembly; his supersession in 1689 by giving the Council the executive power in commission for the time eased the situation.

8. *New York and New Jersey*

New York affords a very interesting contrast to Pennsylvania and also to New Jersey, though the latter colony was an offshoot of the former. On 12 March 1664 Charles II, dividing the spoils before their acquisition, granted to the Duke of York the then Dutch territories of New Netherlands.[1] The territory fell to the English arms in August and its possession was secured by the treaty of Breda. In March 1673 it again passed into Dutch hands, but the treaty of Westminster in 1674 restored it to England, and on 29 June 1674 it was regranted in similar terms to the Duke. The patent is brief, and it contains one very important distinction from the normal. There is no reference whatever to legislation with the freemen; the power is given to the Duke to establish laws and ceremonies of government and magistracy according as near as may be to the laws and statutes of England, and it would be difficult to argue that this compelled the Duke to establish an Assembly. No provision was made for disallowance of such Acts, but the right of hearing appeals was definitely reserved, just as it had been implicitly in the Carolina Charter by referring to the privilege of the inhabitants not to answer in any courts outside the province save those of England. The omission of reference to an Assembly must be taken to have been deliberate. Charles II was probably advised that, as the territory was conquered, he could grant power of legislation as he deemed fit. Moreover, he had the excuse that the Dutch had not evolved an effective legislature and that what they wanted was adherence to the established rules rather than change.

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[1] Macdonald, *Charters*, pp. 136–9. The grant was in common soccage, and no fines, forfeitures, or escheats were granted: Northey, 1705 (Chalmers, *Opinions*, i. 123 f.). This fact, however, was in practice ignored.

The colony was not surrendered without terms. These guaranteed the security of private property and gave the Dutch their laws of inheritance and the application of Dutch law to contracts and bargains made before the surrender. Inferior civil officers and magistrates were to remain in office until the next election, when they were, if elected again, to take the oath of allegiance. In fact by agreement the inhabitants who desired to stay were asked to take such an oath, and readily enough complied. In the English part of the country, Long Island, Staaten Island, and Westchester, English institutions were rapidly introduced by the Governor and Council. On 1 March 1665 at a meeting of representatives of Long Island and Westchester a code of laws, prepared by the Governor and Council from New England and English laws, was presented and accepted. The area was divided into three ridings and styled Yorkshire; boards of justices were established in each, to hold courts of sessions thrice a year, while, united with the Governor and Council, they held annually a Court of Assizes, at which new laws if any were published. In New York in June an English mayor, a Dutch sheriff, and five aldermen, three of them Dutch, were substituted by the Governor for the Dutch régime, not without protest, and they began to administer on English lines. Nicolls took no further steps to introduce English law generally, nor did Lovelace who succeeded him in 1668. Dutch law was naturally restored by the Dutch reconquest, but, on the fresh grant to the Duke, Andros became

Governor with instructions to take measures for introducing English law. The Duke's laws were given to New York in 1674 and gradually English titles superseded Dutch styles in northern New York, though the system remained in Dutch hands and the Dutch language was regularly used. The Duke's régime was not unenlightened; land-grabbing such as had disgraced the Dutch rule was checked, Indian policy was far more effective and intelligent, and the inhabitants were better trained in arms. The Duke, moreover, was punctilious in recognizing the royal authority, and unlike Baltimore and Penn, administered justice in the royal name, while all the inhabitants were compelled in 1674 to swear allegiance to the King. The Council, originally composed of military officers and lawyers from England, gradually came to be made up of permanent residents, and Dutch were not excluded, when their loyalty was accepted; it was essentially aristocratic and in sympathy with autocratic rule. Resistance to it came mainly from the eastern townships on Long Island, which had never cared to admit Dutch rule and had looked to Connecticut, but Nicolls and Andros were able by firmness to quell disorder, especially as Connecticut made no effort to intervene. By authority of the Duke, annual levies of rates were carried out by the Governor and Council through the sheriffs and constables, the latter, together with eight overseers, elected annually by the freeholders in each township.

Inevitably the English settlers demanded an Assembly, and as early as 1669 claimed that Nicolls had in effect promised them one. In 1670 a levy for the repair of the palisade of Fort James aroused strong objections, but the matter was terminated for the time by the Dutch reoccupation. It soon broke out again, and in 1680 the malcontents had their opportunity.[1] Andros was required to go to England to report and answer charges preferred against him on irregular conduct and neglect of the Duke's interests. He forgot to give instructions for the issue of the normal triennial orders for the collection of the Duke's customs, and accordingly the authority to collect expired in November 1680, and next spring merchants in New York declined to pay customs on an incoming cargo. The Council absurdly refused to issue the normal orders, arguing that they must wait the Duke's pleasure, and Dyer, the collector, was arraigned before the Court of Assizes on a charge of treason for violation of Magna Carta, the Petition of Right, and other statutes, simply because he endeavoured to enforce the demand for dues. Dyer denied the jurisdiction of the Court, which then remanded him for trial before the Privy Council in England and petitioned the Duke for government by governor, council, and assembly, alleging that the people had groaned under the inexpressible burdens of arbitrary and absolute power, that by means of revenue exacted against their will their trade had been burdened and their liberty destroyed, and they had become a reproach in the eyes of their neighbours. Brockholls, the commander-in-chief, was seized by panic, and, though Andros sent him a commission for the collection of the dues, he wavered and doubted its legality, since it rested only on custom and on the orders of a succession of governors—surely a sufficient authority. For a year authority was paralysed, and the Duke, whose position in England was not too secure, was willing to compromise. He granted an Assembly not to exceed eighteen members, the Governor and the proprietor to have a negative voice. Revenue acts were to grant the funds to the proprietor, and moneys were to be paid out under Governor's warrant; no reduction of revenue might be made without his consent. Dongan was appointed Governor to carry out this policy, and the first Assembly met in October 1683, a majority of members being Dutch. It passed fifteen acts, including a charter of liberties,[1] which provided for the existence of an Assembly elected by freeholders in the counties; the legislature, composed of Governor, Council, and Assembly, was to meet at least once in three years; sole right to legislate and tax was assigned to it, and jury trial and the other rights assured by Magna Carta and the Petition of Right were granted. On the basis of this settlement a grant of 1*d.* in the pound on all estates in the colony was granted, and customs duties were imposed at higher rates than those of the Duke. Statutory provision was made for county and local courts and the definition of their jurisdiction. The Duke was willing to confirm, but before his approval had been notified the death of his brother gave him royal power, and the Committee for Trade reported unfavourably on the charter as diminishing the prerogative and possibly implying that Parliament had no power to legislate or tax. More important, however, was the desire then growing to alter essentially the form of government, which culminated in the plan for a Dominion of New England.

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[1] N. Y. Col. Docs. iii. 230, 235, 246, 287 ff., 317–21, 331; A.P.C. ii. 24 f.

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[1] Brodhead, *New York*, ii. 659.

The Duke naturally insisted on the exact observance of the laws of trade, and was willing to appoint the royal collectors also collectors of his revenue. Accusations of negligence and favouritism to the Dutch were advanced by Lewin, an agent of the Duke, in 1681, against Andros and Dyer, the collector, but these were refuted by these officers. In 1687 the issue was raised between Dongan and Santen, the inefficient collector, but the Governor disproved the charge.[1]

The Duke of York by an improvident act greatly hampered the progress of his own colony. On 20 June 1664[2] he granted the territory to Lord John Berkeley and Sir George Carteret. There is no doubt that in law his grant could carry with it no governmental powers; the King had not granted the Duke any power to hand over his authority. But in 1672 the grantees, to bolster up their dubious rights, obtained a letter from the King commanding obedience to them, which, if not of legal value, was at least a moral encouragement. Its effect, however, was done away with by the Dutch reoccupation, and doubtless in strict law the grant by the Duke and his own Charter were nullified. Clearly, however, it was not unreasonable to assume that the *status quo* would be restored, and in March 1674 Berkeley conveyed for £1,000 his interest in Jersey to John Fenwick in trust for Edward Byllinge. On 13 June 1674 Carteret for his part obtained another royal letter commanding obedience to the government he might establish. This again could have no legal effect, but on the renewal of his grant the Duke on 29 July[3] granted once more to Carteret a share in New Jersey, this time specifying East New Jersey. A deed of 1 July 1676[4] gave William Penn and others, trustees of Byllinge, who had gone bankrupt, control of West New Jersey, but in this case also it seems clear that in law only territorial and not governmental rights could pass. The result was peculiarly confused. Andros, the Governor of New York, manfully endeavoured to compel both Jerseys to submit to his control for the Duke. In the course of his efforts he brought both Fenwick and Carteret before the

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[1] C.C. 1685–8, pp. 332 ff., 371, 555.

[2] Macdonald, *Charters*, p. 139.

[3] Macdonald, *Charters*, p. 171.

[4] Ibid., pp. 171 ff.

Court of Assizes at New York; the former was convicted because he could not in 1677 produce his title, but the jury in 1680 refused to find the latter guilty. To some extent the matter was cleared up in 1680 when Andros was charged, among other things, with improper collection of customs on the Delaware. Sir W. Jones A.G. hastily reported that the Duke had parted with his governmental powers, and could not claim the customs as he had not reserved them in his grants of 1664,[1] and Andros was informed that he must understand that powers of government had passed.

Constitutionally New Jersey fared very differently from New York. The grantees desired population and offered generous terms to obtain it. Carteret and Berkeley offered in 1665[2] the terms which in the same year were given in Carolina, and these were never effectively revoked. But the grantees were hampered by the doubt as to their governmental powers. The towns of the Monmouth patent, a New York grant, set up in 1667 an Assembly for local business and were unwilling to accept the General Assembly summoned by the proprietors in 1668. But this body managed, despite vicissitudes, to survive, and secured the recognition of the system after the Dutch reoccupation and the re-establishment of proprietary government. Thus on 3 March 1677 concessions and agreements for West New Jersey were signed by 151 proprietors, freeholders, and inhabitants, which are interesting as preluding Penn's work in Pennsylvania. Penn and eleven others further acquired in 1682 from the trustees of Carteret, who died in 1680, his claims to East New Jersey, shortly afterwards increasing their number to twenty-four, and receiving a recognition of their title from the Duke on 14 March 1683.[3] They then framed Fundamental Constitutions which, however, were never accepted by the inhabitants, partly on the score that they did not coincide with the Concessions and Agreements of 1665. Ultimately both parts of the colony were allowed to be amalgamated in the Dominion of New England in 1688. The grants show some features suggestive of future developments in American constitutional history. The insistence on the principles of property and liberty is marked, as is the attempt to make these provisions absolutely binding and above alteration by the legislature. On the other hand, the separation of executive and legislative authority is ignored, and the tendency is clear to reduce the executive to a state of dependence on the legislature by the plan of providing for elective officers holding for brief terms. Indeed, elective governors were duly contemplated. From territories so situated it was little likely that revenue could be raised under the Acts of Navigation,[1] but something was done for the revenue of New York by the efforts of the Duke and his Governors. The former instructed in 1684 Dongan to see that no goods should pass up the Hudson without paying duties at New York, so as to preserve to the colony the Indian trade and help its revenues, much hampered by the stupid severance of the rich agricultural land of the Jerseys. In 1687 protests were made from East New Jersey that Dongan had seized at Perth Amboy an Irish ship and compelled it to enter at New York; this meant levying of taxes by a colony in which New Jersey was not represented. But the King merely ordered that ships be allowed to go to Perth Amboy on condition that the New York dues on their cargoes were paid.

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[1] Brodhead, *New York*, ii. 328, 334; N.Y. Col. Docs. iii. 285; Duke's letter, 6 Aug. 1680 (N.J. Arch. i. 323–33).

[2] Macdonald, *Charters*, pp. 141 ff.

[3] Ibid., p. 190.

9. *New England*

By far the most serious issue facing the King on his restoration was the attitude to be adopted to the New England colonies. Rhode Island alone showed eagerness by proclaiming him on October 1660, a fact due to no lack of republican sentiment or independence, but dictated by its desire for religious liberty, which it hoped Charles II would support. Massachusetts was less enthusiastic, though eventually it wrote to the King, while Plymouth, Connecticut, and New Haven delayed to proclaim the sovereign until the latter part of 1661. But Connecticut acted more wisely than New Haven; it decided in May 1661 to obtain a Charter from the King, whereas New Haven succoured the regicides, Whalley and Goffe, and connived at their escape. Hence, when Winthrop secured Lord Say and Sele's patronage and obtained the grant of a Charter,[2] its boundaries were drawn so as to cover the territory of New Haven. That colony showed bitter resentment; under Davenport's guidance it prepared to resist annexation and appealed vainly to the Commissioners of the New England Confederacy, under the terms of which no union between its members could be approved without agreement of all the colonies. But the grant of New York to the Duke, with a boundary placed as far east as the Connecticut river, followed by the actual occupation of New Netherlands, rendered it unwise further to resist, and in December 1664 a Committee was authorized to arrange for union.

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[1] The usual *quo warranto* was issued in 1685; C.C. 1685–8, nos. 304, 309, 2112.

[2] Macdonald, *Charters*, pp. 116 ff. (23 Apr. 1662); C.C. 1661–8, no. 284.

The Charter of 23 April 1662 creates a body corporate and politic by the name of the Governor and Company of the English Colony of Connecticut in New England in America. The government was entrusted to a Governor, deputy Governor, and twelve Assistants. The Governor or his deputy was to assemble the Company for business, in October and May each year or oftener if need be. At these meetings the freemen of the Company might be represented by two delegates from each town, and the General Assembly and Court was to be composed of these deputies, and the Governor, and at least six Assistants. To it general power was given to order the appointment of officers and the conduct of other business. At the May meeting the Governor, deputy Governor, and Assistants, and such other officers as were thought fit were to be elected. The Crown thus conceded in effect a completely democratic constitution, and prepared the way for Connecticut assuming the form of a miniature republic. Its constitution was maintained with minimal change as the constitution of the State in 1776 and retained the fundamental law of the territory until 1818.

The petition for a Charter for Rhode Island was even earlier in date, for John Clarke, sometime agent for the colony in London, was active in pressing for a grant. But the Connecticut patent included in the territory of that colony the Atherton grant, an area on Narragansett Bay in dispute between Massachusetts and Rhode Island. Clarke protested, but ultimately by agreement with Winthrop the issue was referred to arbitration, and the award in favour of Rhode Island allowed the Charter for Rhode Island to be issued on 8 July 1663.[1] The Charter is interesting for its recital of the many virtues of the colonists, their success in establishing their colony, its value in producing ships, pipe-staves, and other merchandise useful for the southern colonies and commerce in general, and their success in pacifying the Narragansett Indians as well as their desire for and love of religious liberty, which it would, owing to their isolated position, be possible to gratify without breach of the principle of uniformity and adherence to the tenets of the Church of England. The Charter established first the absolute principle of religious toleration despite any law of the realm. It must be remembered that this concession was possible because in the religious legislation of the realm under the Restoration care had been taken to avoid reference, such as was made in the Elizabethan statutes, to the other or future Dominions of the Crown. The Charter proceeded to create a body corporate and politic under the style of The Governor and Company of the English Colony of Rhode Island and Providence Plantations in New England in America. There was to be a Governor, deputy Governor, and ten Assistants, and they were to constitute the General Assembly together with deputies of the freemen, six for Newport, and four for each of Providence, Portsmouth, and Warwick, with two for any other town, elected by the freemen, a quorum requiring the presence of the Governor and six Assistants. The Assembly was to meet in May and October at least, and the officers were to be elected in May. Special power was mentioned for the carrying on of government on the established basis, not being repugnant to the laws and statutes of the realm, pending fresh legislation by the Assembly. Moreover, the Governor and majority of the Assistants were authorized, when the Assembly was not sitting, to appoint commanders for training the inhabitants and defending the territory. But the other colonies in New England and Rhode Island were admonished that it was illegal for any one of them to attack the natives in another without the other's assent. A further provision demanded free right of passage and commercial intercourse for Rhode Islanders with the other English colonies, and the Company was authorized expressly to appeal to the King if any controversy arose with any New England colony. At the same time by fixing the Pawcatuck river as the boundary relations with Connecticut were regulated and an end made of Massachusetts' aspirations. The Charter was duly accepted in March 1664, and those laws which ran counter to it were repealed, essentially that one which required the assent of the towns to legislation. Rhode Island thus was assimilated in constitution to Connecticut, with a legislature capable, if it desired, of dominating the executive and with a very modest dependence on the Crown.

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[1] Macdonald, *Charters*, pp. 125 ff.; C.C. 1661–8, no. 512.

The policy which created these colonies has been disapproved,[1] and Williams's evidence has been adduced to show that it had not the approval of the King's official advisers and was a personal act of the King's. It may be so, but the policy can be defended. To deal with the issue of New England was difficult, and *divide et impera* was not a bad maxim. When the royal Commission of 1664–6 arrived it sought, not without success, to secure support from these colonies which threw into unpleasant prominence the laches of Massachusetts, and the colonies were ready enough in words at least to accept the royal demands for the administration of justice in the King's name, the taking of an oath of allegiance, the admission of freemen to office without religious tests, and the allowance of appeals. The question of violation of the laws of trade was then of negligible importance, and it must be remembered that, in fact, when it was decided in 1686 to merge the colonies in the Dominion of New England, no difficulty arose. Charles II's policy, therefore, in this regard need not be seriously criticized.

Massachusetts presented a much more serious problem.[2] Petitions against the State were abundant; Gorges and Mason had claims against it, the former on the score that it had during the Commonwealth calmly engrossed the province of Maine bestowed on his grandfather, with palatine rights, in 1639, while Robert Mason claimed under a grant of New Hampshire made by the New England Council on 22 April 1635 to Captain John Mason; the lands in question were appropriated by Massachusetts in 1642–3. Petitions from the Quakers, against whom the death penalty had been enforced in several cases, were received, and Breedon called attention to the religious test for citizenship, the failure to take the oath of allegiance, the fact that military commissions were in the name of the colony, not the King, that the regicides had been harboured there, and that many desired to deny dependence on England. Samuel Maverick, with wide knowledge and prudent judgement, advised a course of action which would insist on securing equal rights in religious matters for all Protestants, secure political rights for freeholders, remove the discrepancy between the oath of fidelity and the obligation of allegiance, give the King control of the militia, allow appeals, revise the curious statutes, fix the boundaries, and install a royal Governor, for which end a small military force should be dispatched with orders to take possession of New Netherlands. Leverett, still resident in England as agent, failed to counteract the suspicions felt of the colony, and it was decided to send agents to plead its cause. The position of the colony was defined more exactly; their allegiance bound them to defend the colony from foreign attack and to aid in the preservation of the King's person, realm and other dominions, and to thwart all conspiracies against them; they should also punish crimes, and propagate the gospel in the colony since their dread sovereign was styled defender of the faith. More to the point was the precaution taken to get the regicides out of the way and to proclaim the royal accession in August, while the Act permitting foreign ships to trade was repealed, and instructions given to take the bonds and make the returns ordered by the Navigation Act of 1660. Bradstreet and Norton, the envoys sent, returned after six months with a royal letter which pardoned past deviations from the patent and confirmed it, but commanded that the oath of allegiance be taken, that justice be administered in the royal name, that full religious freedom should be granted to Anglicans, that none be excluded from office because of his opinions, and that freeholders of competent estate orthodox in religion and not vicious in conversation should be entitled to vote in the election of all officers, civil and military. Severities against the Quakers were allowed as in England. The colony yielded as to the administration of justice, and gave further order to carry out the taking of bonds and requiring returns, and promptly revived its law against the Quakers, though it ceased to hang them. The issues of Maine and New Hampshire demanded further investigation, and a royal Commission was dispatched in 1664 composed of Nicolls, Carr, Cartwright, and Maverick, which was charged with taking possession of New Netherlands—whose existence as such the English Government always ignored—and to deal with the colonies. Power was given to the Commission to hear appeals in all matters military, civil, and criminal, and to take steps for the security of the colonies, but caution was ordered. The Commission on the whole succeeded in its mission save in Massachusetts. It pacified New Netherlands, settled the boundary between Connecticut and New York provisionally, and obtained from the other New England colonies an acceptance in substance of the demands in the royal letter to Massachusetts. In Rhode Island they were permitted to hear appeals, and they took the Narragansett Indians under royal protection, naming the area the King's province, and permitting Rhode Island provisionally to administer it. In Massachusetts, however, from the first they met with sullen resistance; their commission was the source of protests of equal bitterness and unreasonableness; their demands were met with refusals or nominal compliance, as in the passing of an Act which nominally extended the class of freemen, but virtually left it unaltered. The final rupture was over the issue of appeals; the Commission desired to hear these in the case of Deane in a matter of violation of the laws of navigation, in that of Porter on a private issue, but the General Court forbade exercise of jurisdiction. The Commission asserted that the matter must now be disposed of by the King, 'who is of power enough to make himself obeyed in all his dominions', and who 'did not grant away his sovereignty over you when he made you a corporation. When his Majesty gave you power to make wholesome laws and to administer justice by them, he parted not with his right of judging whether those laws were wholesome or whether justice was administered accordingly or no. When his Majesty gave you authority over such of his subjects as lived within your jurisdiction, he made them not your subjects nor you their supreme authority.'[1] The denunciation was admirable, and the answer of the Court ineffective. The Commission, however, was able to annoy Massachusetts in one respect, for it left a semi-independent administration in Maine.[2] They also advised the revocation of the Charter and the adoption of a trade embargo as a means of bringing the colony to reason. The King rebuked the colony and ordered agents to be sent. Bradstreet as

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[1] Barnes, *New England*, p. 5. Contra, Andrews, *Col. Self-gov.*, p. 54. Rhode Island's Charter lasted to 1842.

[2] C.C. 1661–8, nos. 45, 46, 48–53, 86–8, 91, 168, 314.

[1] *Mass. Records*, iv. 2, 210. See also C.C. 1661–8, nos. 370, 708, 711, 715.

[2] Massachusetts resumed control soon after; A.P.C. i. 543 f.

Governor advised that this be done, but others claimed virtual independence; the case of Calais was asserted and denied with equal vigour to be analogous in relationship to the Crown. An application from Sir T. Temple, proprietor of Nova Scotia, for aid in an attack on Canada, as France had come to the aid of the Netherlands in the war, was denied, but Charles II was placated by a present of masts and a generous aid in provisions to the expedition Willoughby was preparing to direct against France in the West Indies. The danger to the Charter thus passed for the time. But it was to be revived in the main by reason of the determination to carry out with increasing firmness the supervision of the navigation laws. It is true that Mason and Gorges in 1675 obtained the opinion of the Law Officers that their claims were good as against the colony, but by far the more important consideration was the report of the Commissioners of Customs on the breach of the laws of trade.[1] In 1673 Captain Wyborne of H.M.S. *Garland* had reported[2] that Massachusetts had become the head-quarters of a great trade in American and European products, ships arriving daily from France, Spain, Holland, and the Canary Islands with wine, fruits, silks, and linens, which the merchants traded to American colonies, obtaining commodities which they took direct to Europe without visiting England. The violation of the English laws was not lessened by the fact that New Englanders had engrossed the trade in logwood from Yucatan which ever threatened war with Spain, while by diverting it direct to Europe they supplied England's rivals with cheap dye-stuffs. It was, however, deemed wise to base the first summons to Massachusetts on the issue of the northern boundary and to send Randolph with a missive to command the colony to send agents to discuss the issue and to enable the King to deliver judgement.

Randolph in 1676 was received with studied insolence by Leverett, the Governor, and when he called the latter's attention to the violation of the trade laws, evinced by the arrival of two ships with liquor from France and three from the Canaries, the Governor replied[3] that 'the laws made by your Majesty and your Parliament obligeth them in nothing but what consists with the interests of that colony; that the legislative power is and abides

[1] C.C. 1675–6, pp. 200, 211, 223, 231, 235.

[2] Ibid., pp. 306–8.

[3] Toppan, *Randolph*, ii. 219.

in them solely to act and make laws by virtue of a charter from your Majesty's royal father, and that all matters in difference are to be concluded by their final determinations without any appeal'. Randolph's report was naturally unfavourable, and was followed up by strong arguments in favour of substituting a royal colony for a corporation which violated its Charter in many particulars and defied the laws of trade. The government did not act hastily, but referred to the judges and the Law Officers the legal issues involved. Stoughton and Bulkeley, as agents for Massachusetts, presented her claims to Maine and New Hampshire. Rainsford C.J. and North C.J. held[1] that the Charter of 1629 was valid and had created a corporation in New England, so that its residence was there and the *quo warranto* proceedings of 1635 had not vacated the Charter. On the other hand, they ruled that Gorges had a just right to the political control of Maine, and that Mason, having no royal grant, had no such right, which belonged solely to the King as Massachusetts had never been granted jurisdiction over the territory. The Attorney-General held that to part of the area Mason might have a claim as regards land rights only. He and the Solicitor-General[2] reported in detail on the issue whether the laws of the colony had conformed to those of England. They condemned the use of the term Commonwealth and the assertion that the General Court was the chief civil authority; the failure to order administration of the oath of allegiance was a fatal defect as well as the limitation of the official oath of fidelity so as to limit obedience to the King. The laws creating civil marriage, forbidding the celebration of Christmas, and enforcing observance of the Sabbath were improper, that against heresy was condemned and the sections borrowed from the Mosaic code. The claim to coin money, which had been exercised since 1652, was disapproved, as well as the failure to require military officers to swear obedience to the King and the absence of any law of high treason in its application to the sovereign as opposed to the government. The taxes on imports were disapproved as taxes on English imports. These opinions, it will be seen, were unfavourable in certain respects to the case urged by Randolph and Mason; the latter[3] sought to prove that the company was legally resident in London, that it never possessed *iura regalia* and therefore could not inflict the death penalty or exercise superior powers of government; that the grant of governmental rights in 1629 could not be valid, as the New England patent still held and no surrender of its rights had validly been made; and that the proceedings of 1635 had destroyed the Charter.

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[1] C.C. 1677–80, pp. 102–4, 118; A.P.C. i. 684 f., 722–6.

[2] C.C. 1677–80, p. 140.

[3] Ibid., pp. 126–33.

The colonial agents were called upon to answer a mass of inquiries, and their attempt to treat themselves as envoys with merely power to act on instructions was brushed aside as inconsistent with the position of subjects and spokesmen of a colony. They were told that the colony must respect the acts of trade, repeal laws incompatible with those of England, and beg pardon for the offence of coinage. The colony showed no contrite spirit; it asserted[1] that it did not deem itself bound by English Acts, as the laws of England did not extend beyond the four seas, and they were not represented in Parliament. Orders, however, had been given by the General Court to have the laws of trade enforced as the King desired, but such consent of the Court was necessary, else liberty and property would be invaded. This was an absolute challenge of the authority of Parliament, and it was accompanied by objections to the requirement that products which had paid the plantation duties should be required to pay customs on entry into England. Moreover, insult was added to injury by asserting that the government had not had any earlier intimation of the desire that the laws of trade should be observed, though in fact orders had been given in 1661 and 1663.

There was, however, as usual delay in proceeding to act. Randolph, it was decided, should go out as Collector, Searcher, and Surveyor of Customs, and he spent from December 1679 to March 1681 in Massachusetts. Everything was done to hamper action; he could not persuade juries to condemn, however clear the case; he had to pay fees for special trials, while, if he proceeded at the ordinary session and failed, he could be sued for demurrage; he could only act as informer, not as prosecutor; when a fine was imposed, it was appropriated by the colony, and Randolph was successfully sued for a seizure. Appeals were denied. On his return Sawyer A.G.[2] advised that no appeals lay, but the other Crown officers overruled this view, and the

[1] *Mass. Records*, v. 154 ff.

[2] Toppan, iii. 99.

right was insisted on by the King. Sawyer, however, advised correctly that Massachusetts had no right to tax any save its freemen, and so could not tax or raise customs duties on non-freemen, that is probably four-fifths of the population. It was also ruled that the King was entitled to half forfeitures, and that he could not be compelled to pay costs. When the Collector returned towards the end of 1681, he bore with him a commission under the Great Seal as a customs officer, and the King ordered aid to be given to him.[1] He found, however, that an Act had been passed creating a naval office with the intention of thwarting his efforts by securing that vessels should enter there and not with him. Moreover, though the Acts of Navigation were proclaimed, that of 1673 was omitted, and it was expressly provided that fees must be paid for special courts. There was, in fact, no doubt as to the defiance of the royal orders. The case did not differ materially as regards other issues. In flat disregard of the King's wishes Maine was purchased from Gorges for £1,250, though Mason was more staunch. It was true that the purchase could give no governmental powers, but Massachusetts assumed them. Instructions from the King in 1679, when the agents were allowed to return, to alter the franchise and send over other agents were evaded during 1680 and 1681, which closed with fresh orders from the King and a threat of a *quo warranto* if his commands were disobeyed. Agents then were sent, but with excuses and instructions not to yield the appeal or other essentials, and, when they were warned in London that this was not enough, the General Court in 1683 simply persisted in refusing to alter the rules as to freemen or to allow an appeal or any change in the constitution, Randolph, for his part, urged once more the sins of the colony, its coining money, passing laws repugnant to those of England, levying taxes on others than freemen and customs duties on English goods, imposing again the oath of fidelity, denying the right of appeals, and compelling Anglicans to attend the services of the colonial church. It is not surprising that a *quo warranto* was now issued, but the process was ineffective, for the time for the return of the writ was passed before the General Court had the writ laid before it; moreover, it was disputed by the colony whether King's Bench had jurisdiction over franchises exercised in America and whether the sheriff of London could serve a writ on non-residents. In 1684, accordingly, Sawyer A.G.[1] advised that a writ of *scire facias* in Chancery should be adopted, and by this procedure on 13 October 1684 judgement was delivered under which the letters patent were vacated, cancelled, and annihilated, thus destroying the whole colonial government of Massachusetts, for the colony and the company were inseparably united. The grounds alleged were simply the unlawful levy of taxes on non-freemen and non-residents, the coinage of money, and the administration of an oath of fidelity. Though less important than other grounds, there can be no doubt of their full effect in law.

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[1] Ibid., iii. 112 ff.; C.C. 1681–5, pp. 129, 213 ff.

In the meantime in 1679 steps were taken to provide for the administration of New Hampshire as a royal province.[2] In the first instance, Cutts, a local merchant, was appointed President with a Council and an Assembly was promised. The usual reservation of the right to hear appeals, to disallow acts, and to have the oath of allegiance administered was made as in other royal colonies. The Assembly of 1680 at once manifested itself in touch with Massachusetts; it provided for a freeholder Protestant franchise and annual sessions and ascribed to itself judicial functions, while land cases were to be tried by juries elected by the freemen of the towns, a precaution against the land claims of Mason. The same spirit was manifested towards Chamberlain, who came out with Mason and held a commission as Secretary of the Council: he found it difficult to obtain any pay, and his patron Mason could make little headway in recovering his land; the customs officers were also impeded at every step with the approval of Waldron, who had succeeded to office on Cutts's death. It was decided, therefore, to appoint a royal Governor, to which office Cranfield was appointed in March 1682.[3] His commission assumed the normal royal type, but authority was given pending the passing by the Assembly of provision for revenue to continue the existing rates and imposts. Cranfield's relations with his Assembly were soon strained; he obtained indeed the transfer of the choice of jurors to the sheriff, a provision which enabled Mason to recover the land he claimed, but he was refused a revenue act, and he opposed its claim to establish courts and nominate judges and to have the sole right of initiative. A new Assembly in 1684 was also dissolved by him in anger, and thereafter he sought to raise revenue without the assent of the Assembly; he legislated with his Council only and altered the value of coin, and attempted to enforce on non-Anglican clergy the duty of administering the sacrament according to the Anglican ritual. The result of these divagations from Imperial policy was his removal from the government. The idea of enforcing uniformity in worship had been deliberately discarded in Charles II's policy, and the Governor's action can only be explained by his recognition from his knowledge of Harvard that it was the clerical spirit which was at the root of the opposition of the colonies in New England to any Imperial control. But his régime served to bring New Hampshire definitely into the circle of royal colonies. With the fall of the Massachusetts Charter the way was open for James's great Imperial experiment, the Dominion of New England.

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[1] C.C. 1681–5, pp. 587, 597, 601, 631; Toppan, iii. 297, 307 f.

[2] A.P.C. i. 851–6.

[3] C.C. 1681–5, no. 395.

10. *The Dominion of New England*

The accession of James II greatly facilitated the attempt to consolidate the system of English government in America, for his proprietorship of New York immediately converted that territory into a royal province, and enabled him to plan out a consistent scheme. The immediate step taken was to provide the Governor Dongan with a fresh set of instructions and a new commission.[1] The instructions and the commission alike reflect the new type of royal colonial government; they are full of provisions to secure that the King shall have complete control over his Governor. The officials of the colony were to be undoubtedly directly or indirectly royal appointees; if a Councillor were removed, the reasons must be reported for royal approval; the oath of allegiance and official oaths must be duly administered; regular reports were to be sent home and the minutes of the Council to be forwarded. Revenue was safeguarded in numerous ways: all appropriations were to be made to the King; no grant should be made or Act passed to diminish the revenue without his sanction; reports of expenditure and revenue with vouchers were to be forwarded for the royal Treasurer to inspect; no fine or forfeiture over £10 and no escheat might be remitted without the assent of the Treasurer; money must be paid out only under the warrant of the Governor. No new court or judicial office could be created without the royal order; all writs must run in his name, and the right of appeal was definitely regulated. The coinage similarly was subject to royal orders. The Governor was given legislative power with his Council, to the exclusion of an Assembly, the laws to be sent home within three months for confirmation or disallowance, and conformity with English law was demanded. Wide military authority was conceded, as was specially necessary in the case of New York with its Indian problems.

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[1] N.Y. Col. Doc. iii. 369, 377, 382. For his activity in levying quit-rents, see C.C. 1685–8, pp. 330 f.

Dongan was unquestionably an able Governor; he perceived at once the fundamental necessity for a strong New York in view of its position with regard to the Indians and the French, and he determined to secure the firm support of the Iroquois, who already in 1684 had been induced to recognize the sovereignty of England and to display the Duke of York's arms. To strengthen New York it was in his view necessary to recover the New Jerseys, whose loss encouraged smuggling, and Connecticut also should be added. He deplored the creation of Pennsylvania and wished part at least to be added. With the new Governor of Canada, Denonville, he kept up a lively exchange of claims and counter-claims. The French, however, by an expedition in 1687 were able to secure control of the Seneca country, and to defeat Dongan's designs on Detroit and Niagara. The treaty of 1686 of Whitehall between France and England was rather favourable to France; it enjoined neutrality in America despite war in Europe; forbade either party to aid the Indians if at war with the other; prohibited fishing or trading in each other's territories, and assimilated unlicensed privateers to pirates. No recognition was given of the English sovereignty over the Iroquois, but this did not deter Dongan from sending arms to aid the Senecas in their struggle. Moreover, James II did not fail to support his lieutenant; France was informed that the Five Nations were under English protection, and Dongan was authorized to take measures to protect them. It was also stated that he might ask the other colonies to send aid, while Maryland informed him that it would obey only a direct order of the King.

The issue of defence, therefore, afforded a strong motive for concentration. An equally strong motive was afforded by the interests of Imperial trade and navigation, which demanded that a strong central administration should supersede conflicting jurisdictions, each jealous of the others and all recalcitrant to the Crown. Moreover from a dispassionate point of view, the whole tendency towards particularism among the New England and other colonies and lack of uniformity seemed unsound. It was obvious that the principles of English law could never be made effective when each area had an independent Assembly, which tended to follow its own ways, usually without any specially good motive for differing from its neighbours. Assemblies also were not attractive to deal with: Massachusetts was not a fragrant memory, and under Dongan in New York the Council system had been a success. It had proved, so far as it went, that a province could be governed without serious friction arising, though there was no Assembly, if the Council were prudently guided and its legislation was obviously dictated by a desire for the best interests of the colony. Moreover, the recent experience of the struggle between the royal Governor and Assembly in New Hampshire was not such as to commend the existence of Assemblies. Plans for a redistribution of power in America, therefore, had plausibility. Plans for forming three groups of colonies were in the air, but the first step taken on Randolph's advice was the issue of a commission on 8 October 1685[1] to Joseph Dudley to govern Massachusetts with Maine, New Hampshire, and Narragansett as President with the aid of a nominee Council. Power was given to appoint officers, to legislate but not to tax except by continuing existing taxes, to provide for defence and establish courts. The President and Council were to form a court of full criminal and civil jurisdiction, with appeal to the Privy Council where the value exceeded £300. The Council of eighteen represented essentially moderate interests, the men who were opposed to theocratic government and objected to interference with profitable relations with England. Randolph was included to represent Imperial interests, with commissions as Secretary and Register, in control of land grants, as Surveyor of Woods to secure naval stores, as Collector of Customs and Deputy Postmaster in New England. He bore with him writs of *quo warranto* against Connecticut, accused of legislation contrary to English law and denial of the rights of Anglicans, and Rhode Island, equally guilty of incompetent legislation, but also of violation of the laws of trade and denial of appeals.[1]

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[1] *Laws of New Hampshire*, i. 92–9; his Vice-Admiralty commission covered Rhode Island.

The new régime was inaugurated in May 1686, the General Court merely protesting against the loss of the right of the people to legislate and tax, and four of the Councillors refusing to serve under a constitution which violated Magna Carta. Dudley proceeded with his wonted caution: judicial reforms were carried out, and duly qualified attorneys alone permitted to plead; funds were provided by reviving the tonnage dues on ships and import and excise dues, which the General Court had abolished in order to embarrass the new régime. There was clearly no legal authority for the decision, but, as often, indirect taxation raised no serious trouble when revived in customary shape. Trade policy was handled cautiously by men eager to maintain the profitable trade of the colony; the annexation of Connecticut and Rhode Island was asked for, and remission of all English import duties on goods which had paid export duties under the Act of 1673, thus permitting the colony to preserve her entrepôt trade, and the restoration of the mint closed under the cancellation of the Charter. Still efforts were made to carry out the navigation laws, four ports of entry were designated and a Vice-Admiralty tribunal instituted, but in it cases were tried by a jury[2] selected now by the marshal and a justice of the peace. Umbrage, however, was caused to Randolph by the encouragement given to Capt. George of H.M.S. *Rose*, sent to the coast to enforce submission, to make seizures in lieu of Randolph, and the latter was further disappointed to find that his nominee Dudley declined to do anything to enforce the principle of liberty of conscience enjoined in his commission, and was unable to provide a minister with a stipend or a church for his ministrations. Still, matters were in a fairly satisfactory position when Andros arrived on 20 December 1686 with a commission[3] as Governor.

The area under Andros included Plymouth and was increased shortly after by Rhode Island and Connecticut. The Island on receiving the writ of *quo warranto* on 22 July 1686 determined not to stand suit, but petitioned the King for a continuation of her chartered privileges and liberties, an act regarded as a submission, so that Andros was instructed to annex the territory to the Dominion, which he proceeded to do. In the case of Connecticut the third writ of *quo warranto* ordered 23 October 1686 arrived in December. It was felt that it was impossible for the colony to remain isolated between New York and New England, but opinion was divided. The Council, however, expressed readiness to submit to the King's decision, and annexation to New England was duly ordered and acted on by Andros, who was instructed to add the Governor and Secretary of the Colony to his Council. This decision determined the fate of New York. Dongan knew that the French were building forts, winning over the Indians and attacking those who clung to the English. Forts and garrisons were needed, and without Connecticut it was hopeless to expect that even the addition of the Jerseys would provide adequate revenue. He advocated, therefore, the addition of New York to the Dominion of New England, and it and the Jerseys were in 1688 included in Andros's commission.

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[1] Toppan, iv. 18 ff.; A.P.C. ii. 88; C.C. 1685–8, nos. 282, 283, 632, 645.

[2] Sewall, *Letter Book*, i. 34; see Toppan, iv. 48, 91 ff., 126 ff.; vi. 183 ff.

[3] *Laws of New Hampshire*, i. 148–62, 226–44; C.C. 1681–5, nos. 1928, 1941, 1953, 2017.

The constitution for the Dominion was the result of long thought, and it reflected the Duke's determination not to favour Assemblies which he had expressed as regards New York in 1676, and which he had reluctantly abandoned only to be confirmed in his opposition by what he deemed the immoderate demands of the first Assembly of New York. Against the advice of Halifax in the Cabinet Council of 30 November 1684 the principle of omitting an Assembly was adopted. Sunderland in 1688 claimed the credit of persuading James II to drop assemblies in New England. In any case all power to legislate and tax was given to the Governor and Council, who were empowered to establish courts and themselves act as a court of record. Laws were to be sent to England for approval or disallowance, and appeals were to lie in all cases over £300 value. Military matters were assigned to the Governor with the usual powers to erect forts, use martial law, and employ troops within or without the Dominion. By a most important clause, suggested by Dongan's activities in New York, all new grants of land were to be made subject to a quit-rent of 2*s*. 6*d*. per 100 acres, while the Governor was empowered to determine the conditions of the confirmation of old grants. Liberty of conscience was to be granted to all sects, but particular countenance was to be afforded to the Church of England.

The omission of an Assembly might be defended on the ground that Massachusetts could only thus be freed from the narrow Puritan rule, that the French colonial system showed the strength of a royal government unhampered by representative institutions, and that the constant friction with these bodies paralysed effective defence. But to impose taxation without an Assembly was rash, and it would take years to create an effective quit-rent revenue. Nor was Andros, despite his personal honour and administrative capacity, gifted with that power of working with men which might have carried through a difficult situation without grave friction. His Council was enlarged to include representatives of all the territories; as an executive body it sat frequently, the quorum being seven; for legislation full quarterly meetings were required, but as Councillors were not paid, business fell largely into the hands of the Boston group including the officials, Randolph, Nicholson, who on the addition of New York was made Lieutenant-Governor there, and Mason, whose presence on the Council was in the interests of his land claims in New Hampshire. Taxation became at once crucial, and Andros passed an Act combining the old Massachusetts Acts on Charges Public and Imposts, adding in 1688 further excise dues on rum, brandy, and strong waters and increased dues on wines. The real trouble, however, arose from the efforts to enforce the county rate through the normal machinery of constables, elected commissioners, and selectmen; resistance was frequent and six ringleaders at Ipswich were placed on trial before a special commission, Dudley, Usher, Stoughton, and Randolph, for refusal to pay the rate and seditious votes and writings against it.[1] They pleaded that the Massachusetts law of assessment had been repealed, and that as Englishmen under Magna Carta and statute they might not be taxed without their consent; but Dudley declared that they must not think that the laws of England followed them to the ends of the earth, and they were found guilty by a jury, heavily fined, and required to give bonds for good behaviour. The legality of the conviction cannot be conceded. The Attorney-General in 1685[1] had frankly admitted that New England could not be governed without an Assembly, and despite the revocation of the Charter it was impossible to treat Massachusetts or any of the New England colonies as conquered. Even if New York and the Jerseys were originally in that condition, they had enjoyed Assemblies, and could not legally be deprived of them by prerogative. But it must be admitted that the Crown had an arguable case; Dudley was versed in English legal doctrines, and John Palmer,[2] an English lawyer, in defending later the Andros régime, insisted that colonies were always under the power of the King, who might grant them English law but did not thereby bind himself to maintain an Assembly, citing in favour of his view the cases of Ireland and Wales, and foreign treatment of colonies. It was claimed that the jurors were biased and irregularly chosen, but the new legislation on the judicial system provided for their selection by the marshal and justice of the peace from freeholders, in lieu of election by freemen, and this plan was followed. With greater truth it was pointed out that the warrants for the rate had been issued without use of the royal name, though it is incredible that this really was the cause, as alleged in 1689, of the refusal to pay.

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[1] Toppan, *Randolph*, iv. 171–83.

Other judicial reforms included the organization of a Superior Court of Common Pleas, which was itinerant, local Courts of Common Pleas, Quarter Sessions, and Courts of Probate and Administration. Appeal lay to the Governor and Council where the value was over £100, and to the Privy Council where it exceeded £300. As first arranged in 1685, the Governor with five Councillors sat as a Court of Chancery. Andros, however, left Admiralty matters to local courts with juries. A new list of fees caused annoyance, as well as the introduction of the English form of the oath which excluded some Puritans from serving on juries.[3] But critics readily appealed to English practices when they desired to disapprove of innovations such as the arrangements for trial outside the county in some cases or the eligibility of non-freeholders to be sheriffs, and to the Habeas Corpus Act, though notoriously restricted to England.[1] Some useful work in considering codification of law was entered on.

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[1] C.C. 1685–8, no. 333.

[2] *Andros Tracts*, i. 35 ff. Sommers and Treby are said in 1689 to have held that collection of the taxes was not illegal (*Usher's* case in 20 St. Tr. 299 f.).

[3] C.C. 1685–8, no. 1878.

Liberty of conscience was ordered in Andros's commission, but it was not easy to make it effective, for the laws of Massachusetts, Plymouth, and Connecticut imposed rates on all for the support of Congregational ministers, and exacted fines for non-attendance at divine worship; the Puritans on the Council even tried to extend the law to the whole of the Dominion, but the Anglicans and Quakers refused to agree. The Declaration of Indulgence, 4 April 1687, accorded liberty of conscience, the right to public worship, and exemption from penal disabilities, to dissenters, and a test case against the Quakers of Scituate resulted in favour of their refusal any longer to pay rates.[2] All denominations thus became voluntary, and some hardship was caused by failure to renew the laws for support of schoolmasters, and some Puritans declined to take out a licence as teachers under the requirement of the Governor's commission. But no effort was made, as Randolph urged, to endow secular or Anglican teaching or the Church of England. Andros indeed insisted on the use of a Boston church for services, but this was soon replaced by King's Chapel built by voluntary levies. Harvard was untouched, but New England resented toleration.

The land question raised deep resentment. Massachusetts titles were in confusion; the colony had granted lands, not under seal; it had allotted lands to towns which, not being in law incorporations, could not grant land; English law could not admit purchase from Indians or the law of God or even mere occupation as a source of title against the Crown. In Maine and New Hampshire there were conflicting grants from the New England Council, grants by Gorges and Mason, and by Massachusetts in fee simple or on quit-rent; Plymouth and Rhode Island grants were hopelessly irregular, but Connecticut saved the situation by providing by law before incorporation in the Dominion for the issue of grants under seal to landholders, Massachusetts legislating, only and idly, after the vacation of the Charter. In Maine and New Hampshire royal grants were not unwelcome, but Andros ruined all in Massachusetts by rigid insistence on proof of legal ownership, and by resuming the township commons when such proof was lacking. The cost of taking out patents was also resented, especially as specie was scanty, and quit-rents were disliked. Legal reply, however, to the writs of intrusion of the Governor was impossible and the Superior Court decided for the Crown, though the revolution prevented formal appeals to the Governor and Council being decided.[1] Unquestionably an error of judgement was committed in not offering confirmation of tenures on nominal payments, reserving quit-rents for new grants.

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[1] C.C. 1689–92, no. 133.

[2] Toppan, iv. 167; C.C. 1685–8, no. 1278; A.P.C. ii. 98 f.

The control of the new government at last enabled the trade laws to be effectively carried out. The efforts to import from Europe direct wines, brandies, oil, linen, and woollen cloth were seldom successful, and, though cases were tried in the ordinary courts, there seem to have been few failures of justice. The juries, it must be remembered, were no longer freeholders elected by freemen, all united in dislike of the royal authority. But the result was disastrous to Massachusetts, especially as in 1685 the duties on tobacco and sugar had been greatly increased in England. Lack of European goods prevented New England trading successfully with the West Indies and the southern colonies, and then exporting their products to England; mercantile failures became numerous, and the moderate party recognized that the enforcement of Imperial policy was to be so thorough that they would be ruined, a fact which explains their desertion of Andros later. Matters were not improved by the distressing shortness of coin after the closing of the mint. Andros would have had it reopened, but all he could obtain was authority to fix the rates at which foreign coins should pass current, and his efforts in this sense had no effect in easing the situation. The lack of specie was further accentuated by the efforts taken to put down piracy. A strong squadron was sent out under Sir R. Holmes, and instructions were sent to the colonies that pirates were not to be allowed to escape by being tried ere evidence was available to convict them. Andros secured an Act against piracy, trials apparently being held by special commission, but little success was attained, though piracy decreased and with it a very useful source of specie, which was badly needed to help the colony to resume its external trade. Something might have been done to encourage new efforts towards the production of naval stores and copper mining, but, failing this, the state of the colony was decidedly deplorable and its resentment of the new policy can be fully understood.

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[1] C. C. 1685–8, no. 1878; *Andros Tracts*, i. 49, 91, 152 f. Andros infuriated the towns further by taking away the right of discussion in town meetings and control of poor relief, now assigned to justices as in England.

Very different was the success achieved in defence. Dongan's energy had checked in large measure the French encroachments, and Andros, a good soldier, followed in the same line of action. He found as usual no military preparations of importance, derelict forts, and the munitions missing. But he brought with him two companies of regulars with stores, and he had a total militia of over 13,000 or 15,000 when New York and New Jersey were added, to depend on. Hence he was able to restore the forts and supply new fortifications, to provide garrisons for the security of the frontier against Indians and French, and to conciliate the Indians or to overawe those who were disaffected. Strengthened by his appointment to control New York, he was able to demand the withdrawal of the French forces from the Seneca territory, and, by the time of the outbreak of the revolution in April 1689, he had made effective preparations which would have permitted a strong attack on Canada. The opportunity was never to recur in the same form, for the centralization of authority and resources for the time achieved was never possible during the remainder of British rule in America, and the badly organized and ill-equipped expeditions arranged in later efforts brought little for a loss of life and treasure out of all proportion to the effect aimed at.

11. *Bermuda and Newfoundland*

Bermuda till almost the close of Charles II's reign continued to be under the control of the Company, which insisted on its trade monopoly. The colonists were compelled to receive their European goods in the magazine ship, which brought back to England their tobacco and cedarwood until in 1670 its export was prohibited to prevent its early destruction. There grew up early a clandestine trade in tobacco, which was sold to foreign ships and taken to foreign parts. In 1677 this practice was brought under the notice of the King by a petition from four members of the Company, but, on hearing, the complaint was dismissed, though it had effectively played its part in suggesting to the government that the Company was defeating the operation of the enumeration clause of the Act of 1660. In 1679 the attack was renewed by colonists; it was pointed out that, through the Company's monopoly of European exports, excessive prices were charged; that tobacco could only be shipped to England and not to the colonies; that the local whale fishery was monopolized; and that the legislature had ceased to be called together. The Lords of Trade were struck by one consideration which was not specially stressed in the complaints, the fact that the Company now had a minority of about a quarter of its members resident in England, so that the other three-quarters could not take an effective part in the conduct of its business.[1] It was, accordingly, decided to proceed by *quo warranto* or *scire facias* for the vacation of the charter. There ensued a period of counter petitions and hesitation, but finally in November 1683 Sawyer A.G. determined that the *quo warranto* should be proceeded with, and the Charter was vacated in 1684, the island then falling under royal control.[2] Absurdly enough, the royal government endeavoured to maintain the very features of the Company's régime which had excited most bitter opposition, the imposition of a tax of 1*d.* per lb. on tobacco and the restriction of trade to the magazine ship. The islanders, however, were recalcitrant; they smuggled their tobacco out and they would not pay the duty, nor would the Assembly, which was duly continued in being under the royal régime and became effective in operation, consent to legislate to impose the tax. Finally in 1688, on the advice of the Commissioners of Customs, the island was given the normal liberty of communication with the rest of the dominions on condition of obeying the laws of trade.[3]

Newfoundland called for attention immediately on the restoration, and the result of investigation was to determine that the Kirke patent of 1637 should not be revived, while Baltimore's rights in regard to Avalon were admitted, though he did little to make them effective. The King, however, reissued the Star Chamber rules of 1634 with a further provision intended to confine the carriage of men to Newfoundland by fishing vessels to their own crews or permanent residents, as opposed to those who desired to fish in small craft from Newfoundland as a base. As before, the enforcement of the rules was left in part to the Mayors of the fishing towns in the west of England and the Vice-Admirals of counties according as offences were committed in Newfoundland or on the sea.[1] The French in 1662 complicated matters by establishing themselves at Placentia. The struggle soon developed between the advocates of the establishment of ordered government and a Governor, and the fishermen from west England whose demand was that, instead of attempting to establish a settled government, the planters should be removed, the alternative being to allow the fishery to pass from English hands into those of colonists, just as the New England fisheries had been engrossed by local men. The government was not ready to encourage settlement, and in 1670–1 a fresh set of orders[2] aimed at preventing ships carrying out any men who would be left behind, while planters were not to live within six miles of the shore. At the same time the Admiral, Vice-Admiral, and Rear-Admiral in each harbour (i.e. the first three captains to arrive) were instructed to secure the carrying out of the rules as to fishing and to preserve the peace and to bring offenders to England. In trials recorders and justices of the peace were to be joined to the mayors, and reasonable fines were to be imposed. A doubt was suggested as to the treatment of murderers and thieves and other criminals, in view of the lack of any Earl Marshal's Court to deal with such cases, and it was suggested that recourse should be had to Parliament to establish the rules, while consideration was to be given to establishing a judicature locally. The agitation for a Governor was not killed by the hostility of the government and was renewed in 1674. The Lords of Trade on 15 April 1675[3] decided that the colony should be discouraged, and that its settlers should be recommended to go to some other part of the English dominions, and the rules of 1634 were once more re-enacted with the additions made earlier. It was, however, now expressly noted that there was no Court Martial in the island and that criminals guilty of killing or theft of goods to the value of 40*s*. should be brought to England and the facts notified to a Secretary of State for the necessary action. It was also determined to enforce from 1676 the six-mile rule against planters, and compulsory removal was meditated. Happily Sir John Berry, who was sent in 1675 in command of the convoy which now regularly safeguarded the fishing fleet, reported strongly against the project of removal and defended the planters from the attacks of the adventurers from the west. In 1680 the Lords of Trade had been persuaded to encourage moderate settlement, to permit planters the right to settle near the shore, and to contemplate establishing a Governor, but this step would have involved cost and was dropped. It was in any case to be made clear that his power as to fishermen was merely to see that they were taken to England for trial and punishment, so jealously was the possibility of interference with the fishery regarded, on account of its importance in encouraging English shipping and seamen.

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[1] A.P.C. i. 686 f.

[2] C.C. 1681–5, pp. 548, 676, 738; A.P.C. ii. 15, 55 f.

[3] C.C. 1685–8, pp. 270, 359, 392 ff., 556, 568, 597.

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[1] Prowse, *Newfoundland*, p. 154; C.C. 1661–8, no. 7; A.P.C. i. 374 f.

[2] A.P.C. i. 558–63. Vice-Admiralty courts no longer appear.

[3] Prowse, p. 192; A.P.C. i. 621–6; C.C. 1675–6, no. 549.

From the point of view of the laws of trade, there was some confusion in England as to the status of the island, and the Commissioners of Customs in 1687 roundly declared that it was not a plantation in view of the absence of settled government, but this doctrine was clearly wrong.[1] Some illegal trade took place, for the fishing ships had to take in salt in Europe and could not be expected to refrain from shipping wine and spirits also, but the idea that the island formed an important centre of illicit trade whence New England derived substantial quantities of European goods was clearly not well founded, the trade being small. What was more substantial was the complaint that the New Englanders succeeded in securing the desertion of considerable numbers of seamen who should, under the rules, have been taken back to England. The planters were left far too much to themselves, without any legal form of government.

12. *The Hudson's Bay Company*

The introduction of two French traders to Prince Rupert in 1667 was the cause of the genesis of the Hudson's Bay Company to exploit the fur trade.[2] The Charter of 2 May 1670 incorporates the Governor and Company of Adventurers of England trading to Hudson's Bay, and confers the right of sole trade in all 'seas, straights, bays, rivers, lakes, creeks, and sounds . . . that lie within the entrance of the straights commonly called Hudson's Bay, together with the possession of all lands and territories as aforesaid not actually possessed by other English subjects, or by those of any Christian prince'. The Company were constituted true and absolute proprietors and lords of the territories with power to make peace and war with any non-Christian power. The monopoly of trade thus conceded had the advantage not merely of being confirmed by a proclamation of James II on 31 March 1688 renewing the prohibition of trade by others, but, in the time of the revolt against monopolistic chartered companies, it was protected by the grant of an Act of Parliament in 1690[1] in which the monopoly was confirmed for seven years after a clause had been inserted securing the protection of the feltmakers by requiring regular sales of beaver. The fortunes of the Company were gravely affected from 1691 to 1717 by French aggression, and the Treaty of Ryswick left the position unsound. In 1702, however, the Company re-established itself in the Bay, and its position was given international recognition by the Treaty of Utrecht in 1713. The fact that first Rupert and then James himself held the office of Governor was of great significance in its initial progress.

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[1] C.C. 1685–8, p. 309; Stock, ii. 398.

[2] Scott, *Joint-Stock Companies*, ii. 228 ff.; Beckles Willson, *The Great Company*, ii. 318–36.

The Charter incorporating the company gave it the usual right to select by general meeting a Governor and seven committees, of whom one was to be elected as deputy Governor, and three with the Governor were to form a quorum. The membership of nineteen in the Charter grew slowly; in 1690 the capital stood at 105 shares of £100 each with one vote, but, after receiving the Act, the stock was trebled and one vote assigned to £300 holding. Power was given to the General Court to establish laws for the good government of the Company, and of its officers in its territories and on the voyages, to fix penalties and punishments, and to appropriate for its benefit the fines and amerciaments imposed; moreover, the Governor and Council of each fort or plantation were empowered to deal with crimes and misdemeanors according to the laws of England, while, if such misdeeds were committed in any place where no Governor and Council were available, the offenders could be sent to an adjacent Governor and Council or to England. The latter part of the power was obviously difficult to justify, but in 1670[1] the problem of securing punishment in England of colonial offenders had just begun to be raised. The territory was granted the style of 'Rupert's Land' and expressly declared to be a plantation, to be held in free and common soccage of the manor of East Greenwich, with full mineral rights, on the payment merely of two elks and two black beavers if the sovereign visited the lands. The rights of the Company, though not specifically confirmed by Parliament, were referred to in the Act of 6 Anne, c. 37, and of 18 Geo. II, c. 17, as existing, and their validity was held by the Law Officers of the Crown[2] when the matter was raised in 1849 to be clearly established, nor was the offer when made to critics of the Company that the matter should be tested by them by a petition which would have been referred to the Privy Council taken advantage of. But no power to tax was assumed by the Company until the period of regular settlement in the nineteenth century, when in lieu of taxation proper agreements were required from the settlers to pay contribution to the cost of government.

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[1] 2 Will. & Mar. stat. 1, c. 15; Stock, ii. 19, 21 ff. It was not renewed in 1698, ii. 221–9.

13. *The West Indies*

The restoration saw the addition of the Bahamas to the list of colonies. Eleuthera was settled in the Civil War and in 1666 New Providence, both by Bermudans, whose elective Governor was commissioned by Modiford of Jamaica pending the royal pleasure. Ashley, however, secured the grant of the islands to the proprietors of Carolina, who reserved for themselves ambergris, cedar, and braziletto wood, but failed to aid the development of the islands, which became the scene of privateering against Spain with reprisals. The proprietors recognized in 1688 a Governor elected by New Providence the year before, but conditions remained anarchic.[3]

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[1] That English courts can punish crime committed abroad only by statute was later clearly recognized: cf. *E. I. Co.* v. *Campbell* (1747), 1 Vezey 246; arguments in 20 St. Tr. 197 f., 218, and instructions to send criminals home were gradually dropped. Cf. C.C. 1712–14, p. 31; *R.* v. *Munton*, 1 Esp. 62; *R.* v. *Johnson*, 6 East, 590.

[2] House of Commons Paper 542 of 1850, pp. 7, 8.

[3] C.C. 1669–74, pp. 56, 119, 280, 296 f., 402 f., 406 f.; 1681–5, p. 516; 1685–8, pp. 448, 570.

In the West Indies proper, however, royal control was established. A complex play of conflicting forces resulted in Clarendon's devising a scheme[1]—which later was to figure among the charges in his impeachment—for the assertion of royal authority over the Caribbean Islands. Willoughby was permitted to rule during the seven years still to run of Carlisle's grant, taking half the receipts, while a pension for two lives was granted to Marlborough for services to Carlisle, a pension in perpetuity to Kinnoul, Carlisle's heir, and the rest to Carlisle's creditors, who in fact received nothing. To provide this revenue—all of which would ultimately be royal—Willoughby secured from Barbados, represented by the old Assembly, a grant of an export duty of 4½ per cent., the island to be relieved in return of the expense of the sessions, the Council, the prison, fortifications and other public charges, while owners were to hold land in free and common soccage freed from all feudal dues.[2] In St. Kitts, Nevis, Montserrat, and Antigua in 1664 the Governor secured the 4½ per cent. duty merely in return for the extinction of proprietary claims, so that these islands had not the grievance which Barbados experienced through finding that the King considered himself entitled to retain the income, merely paying for the Governor and making tardy and inadequate provision for the small garrison. Willoughby quarrelled seriously with the Assembly, which in 1666 endeavoured to use its power to withhold supply to obtain control of the supply of munitions and the militia, but patriotically it aided him in preparations for his fatal expedition of 1667. The struggle was renewed under his nephew William, Lord Willoughby, further embittered by protests against the Navigation Acts. Willoughby failed to alter royal policy but was given a new commission as Governor-in-chief of the Caribbean Islands, wholly dissociated from any proprietary grant. In accord with the new principle of royal control his powers were limited; legislation might only remain in force for two years unless confirmed by the King, and the Governor might not appoint to any post ever filled by the

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[1] A.P.C. i. 362–5. See Stock, i. 340–2; Clarendon, *Life*, iii. 407–26. Willoughby also was given (with L. Hyde) Surinam, which he had colonized in 1650, but it was given to Holland in 1667.

[2] A proviso in the Act was annulled on confirmation; A.P.C. i. 397. This was clearly illegal. In Antigua the Act was renewed 19 May 1668 (20 St. Tr. 256); in St. Kitts in 1727.

Crown. Under Atkins (1673–80) the relations of colony and Crown became more strained than ever; the colony protested against the misuse of the 4½ per cent. duties, the monopoly of the African Company and the unsatisfactory supply of slaves who were now indispensable, the Navigation Acts, and royal appointments such as that of Stede as Provost Marshal (1673–5) and of Wyatt as Clerk of Markets in 1676. Coventry as Secretary of State at first sympathized with colonial representations on this score and promised to ask the King to draw up a small list of patent offices reserved for his grant, but later asserted that the King was determined to know better his servants, an excellent resolution ruined by the practice of allowing offices to be exercised by deputy.[1] Atkins sealed his doom when, despite strong remonstrances in 1677 and 1680, he persisted in failure to send home promptly copies of laws and reports. The Assembly was recalcitrant; if in 1675 it did not insist as in 1674 in denying the Council right of initiation of taxation, it compelled agreement that the proceeds of a liquor impost should be disposed of by Governor, Council, and Assembly jointly. Dutton (1680–5) was not even honest; his dissolutions of the Assembly and arbitrary imprisonment of opponents led to his removal in disgrace, but his commission contained two concessions of some value: laws were to be in operation until disallowed, and the King would not appoint henceforth to offices hitherto filled locally.[2]

The Leeward Islands, which had small natural connexion with Barbados, were given in 1671 a separate Governor-in-Chief in Sir C. Wheler. His commission restricted his authority as compared with Willoughby by denying the ordinance power, as also in Barbados; under the proprietary régime it had been protested against. Laws were to last only two years unless confirmed, but a proposal to take away the power to appoint deputy Governors in the islands was dropped on Wheler's protest.[3] By an exceptional concession only Councillors need take the oaths of allegiance and supremacy. Power was given to raise two companies from Bridge's regiment in Barbados disbanded in 1670, with whose aid Wheler recovered St. Kitts from the French, who still held it, despite its surrender by the treaty of Breda, though he failed to adjust claims with de Baas. Stapleton, deputy at Montserrat since Willoughby's time, was appointed in his place in 1672,[1] and proved a loyal Governor, though both he and the home government failed to adjust matters as regards French claims. Under Johnson,[2] his successor in 1686, the appointment of deputy Governors and Councillors was reserved to the King, but laws were to remain in force unless disallowed, a change motived by the realization of the power of the legislatures to evade disallowance by frequent re-enactment. The island legislatures were all of the same form, with twelve Councillors and representative Assemblies, Nevis in 1682 insisting on excluding all save freeholders from the franchise. The Assemblies began to assert rights of control, but Stapleton defied the demand of Nevis to control the island accounts, ordering them to be presented to the Governor and Council alone. The islands profited at the expense of Barbados from the King's treatment of the 4½ per cent. duties, which in 1670 were farmed out at £7,700 a year for seven years, with a net receipt of £21,000, and for the next seven years at £5,300 with a net receipt of £22,000. The King paid the island Governors, and the two companies—though they were miserably ill-provided for—and gave a couple of grants for fortifications. From 1684 the duties were entrusted to the Commissioners of Customs and soon began to yield a net income which the King retained after paying for the Governors.

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[1] Harlow, *Barbados*, pp. 224–6.

[2] C.C. 1677–80, nos. 1477, 1554, 1563.

[3] C.C. 1669–74, nos. 393, 416–19.

Royal control was enforced by requiring reports and transmission of laws as in Barbados, the deputy Governors and Councils being asked in 1680 to send quarterly reports, though little came of this. But by 1681 Stapleton had sent home all the laws he could find, and the Privy Council showed its solicitude for the interests of the African Company and British merchants by securing in 1683 the disallowance of the Antigua Act of Extent of 1669, an ingenious device to prevent successful distraint on land or property in the island by English creditors. Antigua's concern evoked the plan of sending agents to London to secure confirmation of Acts, and the other islands followed the example. Stapleton aimed at consolidating the islands, and, acting on the general power in his commission, which Wheler had thought insufficient, arranged first for a consultative body and then for a true legislature for the group. In 1678, after arranging a treaty of neutrality with the French representative, he summoned representatives of the island Councils and Assemblies to Nevis, when they agreed to send delegates to support the proposals in London and to divide the cost. Similarly in 1681 a joint negative was returned to the King's suggestion of the commutation of the $4\frac{1}{2}$ per cent. duties. In 1682 legislation was passed forbidding deportation to foreign parts of English subjects, and securing mutual recognition of legal documents, but a perpetual revenue Act was refused as well as a salary for a London agent and a plan for common defence. In 1683 also little was done; the Council rejected a standing patrol to watch the Indians passed by the Assembly, and the Antigua Assembly equally rejected the proposal. The legality of the federal legislature was indeed not denied, despite St. Kitts protests, and any doubt was removed by express powers being given to Johnson in 1686, but the project remained unpopular and he never summoned the legislature.

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[1] C.C. 1669–74, no. 740.

[2] C.C. 1681–5, no. 858.

Jamaican constitutional history was far more interesting and varied. It raised issues regarding the royal prerogative which have already been discussed.[1] Transition from martial law and military control was initiated by conferring on D'Oyley, commanding the forces, a civil commission in February 1661[2] with power to establish courts and legislate with an elected Council of twelve members, with whose assent he did in fact pass a revenue Act. He was succeeded by Windsor, appointed in June 1661, with a salary of £2,000 from English funds. His commission[3] of 2 August 1661 contemplated an elected Council for legislation, but his instructions[4] of 21 March 1662 adopted the usual plan of a nominee Council and an Assembly, thus cancelling the legislative power of the Council through its change of composition. Laws were to last for two years only unless confirmed; the army was to be replaced by a militia; toleration to be granted to all Protestants, only officers being required to take the oath of supremacy, that of allegiance sufficing for others

[1] See ch. i. § 2.

[2] C.C. 1661–8, nos. 20 and 22.

[3] Ibid., no. 145.

[4] Ibid., no. 259.

over sixteen. Windsor arrived in August 1662, established law courts, arranged for the issue of land patents, disbanded the army, and erected an Admiralty Court, while steps were taken to encourage the exercise of Anglican rites as demanded by the King. On Windsor's hasty return home, Littleton as his deputy governed, legislating with the Council only, and imposing taxation quite illegally. But in January 1664 the first Assembly met and stigmatized all legislation without the assent of an Assembly as void, but enacted such portions of the Acts of the earlier régime as it thought desirable. This reduced to its true limits the ordinance power in Jamaica; it extended merely to by-laws or temporary provisions pending legislation, and in 1674 the Governor and Council frankly avowed their inability to waive a parish levy as it rested on an Act.[1] The Assembly further laid down that no tax could be imposed on the island save by Governor, Council, and Assembly, and created a new financial system,[2] under which all taxes including customs and the new poll, land, and liquor taxes imposed by it should be controlled by Treasurers, who should expend the proceeds only under appropriations by the legislature. The model chosen was doubtless Virginia, where the rule under the Commonwealth was of control of customs by the House of Burgesses, a practice continued by Act of 1662, while in 1664 the House appointed an Auditor to report on the revenue accounts. These drastic Acts, however, were repealed by a new Assembly which met in October under the new Governor Modiford, whose régime until 1670 marked the golden age of privateering at the cost mainly of Spain. Jamaica waxed rich on prizes and one legislative session alone was summoned, Modiford continuing expiring laws by proclamation which was, if illegal, excused by necessity and acquiescence, while the existence of war enabled him to suppress unrest by martial law. His Assembly restored a more normal financial system; the revenue was granted to the King for the public use of the island, paid to a Receiver, appointed by the Governor, and expended under the Governor's warrants for the purposes indicated in the Act, while the accounts were open for inspection by Council and Assembly. Another Act put in force English liberties and laws and statutes (save those imposing subsidies). These measures remained without notice in England, while the peace with Spain in 1670 resulted in the suppression of privateering and Modiford's supersession and decidedly illegal imprisonment.[1]

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[1] C.C. 1669–74, no. 409.

[2] Acts in Whitson, *Jamaica*, pp. 169–78.

Lynch (1671–4) and Vaughan (1674–8) had to reckon with an Assembly which, under Samuel Long's leadership and in frequent session, rapidly acquired power, while Vaughan's knowledge of English usage helped it to model its procedure. In 1672 Lynch had to allow it to appropriate the quit-rents, and to judge its own returns; in 1674 a revenue Act was granted only in return for his assent to an Act to suppress lawyers, while by Act the membership of the Assembly, originally 20, was fixed at 32, excluding royal power to alter. Vainly did Lynch suggest wider powers for Vaughan. Instead he[2] was hampered like Atkins in Barbados by naming his Council in his commission, allowing provisional appointments only when its number fell under nine, and requiring its assent to any suspension, pending the royal pleasure. Acts were only to last for two years, but might now be disallowed earlier; none must be re-enacted except on very urgent occasions and never more than once except with the King's express consent. The Assembly in 1675 elected a Speaker without the suggestion of the Governor, and as early as 1677 claimed the privileges of the House of Commons, asserting the right to fine or imprison members and others for contempt. It accepted from Vaughan the rule of three readings and admitted his refusal to sign Bills in its presence. Its anger was soon aroused by the royal claim to appoint to offices which had been applied to four posts in 1672–4. As Martin had been given the post of Receiver of royal revenues, including customs, impositions, quit-rents, fines, forfeitures, and escheats, the Assembly in April 1675 moulded the revenue Bill to appropriate the money to the use of the island, omitting the King, and appointing a Collector to receive it, the Treasurer being required —to please Vaughan—to pay it out under his warrant but according to the terms of the Act. The Militia Act was passed, but with a clause asserting that it did not add to the Governor's powers even if it did not abridge them. Both Acts were disapproved at Whitehall, but the Assembly of 1677 was intractable.

[1] C.C. 1661–8, nos. 535, 656, 664.

[2] C.C. 1669–74, nos. 1251, 1252, 1258, 1386, 1392, 1398.

Martin, now a member, was expelled, fined £50 and imprisoned for his temerity in asserting that no money could be raised but that he must collect it under his patent. The Militia Act was passed without any saving of the royal commission, Long declaring that it was no law to them and there might be much unlawful in such commissions. The Assembly demanded also acceptance of a Bill of Privileges or of a hardly less drastic Bill to declare the Law of England in force, including the doctrine that taxation must be 'by the Act of Parliament in England naming and relating to this island' or by the consent of the General Assembly, an interesting and unique admission of the taxing power of Parliament.[1] Moreover, it endeavoured to respite a pirate despite Vaughan's refusal and was foiled only by a hasty execution.

As has been seen, the Imperial effort to reduce to submission the Assembly failed, and Carlisle's new commission and instructions[2] allowed legislation subject to certain restrictions; appropriation might be allowed, but not of the Governor's salary; exemptions to Jamaican shipping, lessening of revenue, re-enactment of laws without special approval, and interference with Admiralty jurisdiction in fixing parish boundaries, were forbidden, while a perpetual revenue Act was to be asked for. The triumphant islanders[3] for their part demanded the association of the Council with the Governor as Chancellor, Vice-Admiral and Ordinary, and the taking away of the power to move men from the island on military service, and, while a Revenue Act was obtained by Morgan as deputy for Carlisle, it included amazing provisions that it would cease to be operative unless the King confirmed within two years verbatim a mass of Acts, including one to declare English law in force and a Militia Act, forbidding the Governor to remove men from the island or do anything contrary to English law. The Assembly was to meet annually for at least ten days.[4] The Privy Council, of course, could not accept such proposals, and Lynch, reappointed Governor,[5] secured in 1682 a seven-year Revenue Act and in 1683 one for twenty-one years. The King surrendered his quit-rents, fines, and escheats and permitted specific appropriation of £1,250 for defence, but expenditure was to be on the Governor's warrant and collection by the Receiver-General, though the Assembly could inspect accounts. In return the King confirmed nearly all the other Acts for twenty-one years from November 1683,[1] but not that declaring English law in force. The desire of the King for a permanent Act was temporarily met by Albemarle (1687–8), who, after an election won by force and fraud, obtained the measure from the Assembly,[2] but the Privy Council felt unable to confirm it, though not prepared to disallow so important a measure.

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[1] Whitson, *Jamaica*, p. 63.

[2] C.C. 1677–80, nos. 1561, 1562, 1566, 1567–72, 1612.

[3] Ibid., nos. 1575, 1588.

[4] Ibid., 1681–5, nos. 270, 285, 286.

[5] Ibid., nos. 197, 227.

14. *The African Company*

The cultivation of sugar in the West Indies induced the devotion of effort to provide slaves. Elizabeth's Guinea Company and those of 1618 and 1630[3] had been concerned with gold, ivory, wax, gum or other tropical products, but that patronized in 1660 by the Duke of York turned its interest to slaves in opposition to the Dutch. Its resources were too slight for this purpose, and in 1663[4] the Royal Adventurers trading to Africa received a monopoly from Sallee to the Cape of Good Hope, while royal forces helped to secure liberty of trade through the treaty of Breda in 1667. But serious losses, partly through Barbadian dishonesty, induced the Company to make way in 1672[5] for the stronger Royal African Company which acquired posts on the Gold Goast and Gambia, bartering manufactures for African produce but especially negroes.

The Company's monopoly was a constant source of friction with the colonies, which ignored its annual expenditure of £15,000 to £20,000 on forts and the fact that, if it were crushed, the Dutch and French shippers would charge ruinous prices. Interlopers were punished by loss of ship and cargo, divided equally between the Crown and the company, but enforcement was very difficult. Stede in Barbados was proceeded against for triple damages under the statute of Monopolies for seizing a ship, and in Jamaica the common law courts held that the Company's monopoly was illegal.[1] Imperial naval vessels, however, effected captures from 1682 in the islands, and the merchants of St. Kitts and Nevis were forbidden to purchase slaves from the Dutch at St. Eustatius despite the ingenious plea that the monopoly had only to do with trade in Africa. St. Kitts also was prevented, like Antigua, in 1683 from legislating to defraud the Company by undue protection of the property of debtors, while in 1684 Jamaica was required to abrogate an Act passed to enforce an agreement as to price which had become impracticable of fulfilment. Relaxation also was made in the Company's interest of the laws of trade, for in 1677 Jamaica and Barbados were permitted to supply negroes to Spanish ships, though, as the Lords of Trade pointed out in 1678, this was plainly illegal. None the less in 1684 the Commissioners of Customs, in accord with Lynch, gave formal approval of the Jamaican trade,[2] which soon led to suggestions of authority for the sale of English manufactures to Spanish ships, despite the prohibition of importation of such goods into Spanish colonies.

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[1] C.C. 1681–5, nos. 1570, 1584, 1627, 1639, 1640; A.P.C. ii. 833. The Imperial companies were disbanded in 1680 and Imperial salary grants dropped in 1681.

[2] C.C. 1685–8, no. 1927; A.P.C. ii. 122–4.

[3] Scott, *Joint-Stock Companies*, ii. 3 ff.

[4] C.C. 1661–8, no. 408; Stock, i. 342–50.

[5] C.C. 1669–74, no. 407.

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[1] C.C. 1675–6, p. 496; Chalmers, *Opinions*, ii. 285 f.; 21 Jas. I, c. 3, s. 4; C.C. 1675–6, pp. 368 f., 416 ff.

[2] C.C. 1677–80, pp. 120, 175, 209 f.; 1681–5, pp. 677, 719, 728, 733, 739; 1685–8, pp. 19 f., 54 f.

V. THE REVOLUTIONARY SETTLEMENT

1. *The Assertion of Imperial Supremacy*

IT may have seemed to those colonists who availed themselves of the opportunity of the downfall of James II to secure power in the colonies that the policy of the new King should accommodate itself to their views and that the constitution of the Empire should be revised on the lines familiar to opinion in Massachusetts and not unknown elsewhere. On this view the colonies would have been regarded as sister States on a footing of alliance with England, as dominions of the King of England as were Scotland and England. But it is certain that such an idea had no appeal at all to William III. He showed no trace of accepting any view other than the normal one, of the dependence on the Crown of the colonies, and he differed from his predecessor only in the essential point that he was not prepared to adopt the policy of the suppression of Assemblies. What he would have done had the matter been an open one may well be doubted, but in point of fact the circumstances of his advent to power were such as precluded any real alternative to the action which he took. It is not as if he were at liberty to call Assemblies into being or not. They had re-established themselves where they had been done away with, and he would have had to use force for their suppression, a course to which James II had not been compelled to resort. But this necessary concession involved with it the abandonment of the conception of the Dominion of New England, for the restoration of Assemblies meant the complete revival of the separatism of the colonies and opened up no chance of a policy of real union. As it was, William III clung long to ideas of consolidation. But his position was complicated by the fact that he had always to reckon with the criticism of Parliament. For a time it had seemed possible under the Stuart régime that Parliament and the prerogative could be combined to lay down a policy and enforce it, but Parliament was now jealous of the prerogative, and it was not to be persuaded into any course which would strengthen the executive. This divorce between King and Parliament was decisive against the plans of the King to carry out an energetic policy in securing the subjection of the chartered colonies and the proprietary governments. Had William III been able to depend on the legislature, it can hardly be supposed that he would have permitted any of these odd forms of government to remain in existence in view of the clear evidence of the obstacles which they put in the way of enforcing Imperial policy.

The theory of the laws of trade was in the fullest measure accepted by William III and by his advisers, and their attention was early called to its importance by the unceasing efforts of Randolph, appointed in 1691 Surveyor General of the Customs in America. His travels led him to report that both in Virginia and Maryland there must be set up Courts of Exchequer if any real effect were to be given to the laws of trade, while in Massachusetts he found the old device of making the naval officer control entries and clearances in full swing to the end of hampering the collector of customs. He laid special stress also on the activity of Scotsmen and their concern in illegal trade, and his warnings were strengthened by the action of the Scots Parliament in 1695 in creating the Company of Scotland trading to Africa and the Indies.[1] Intense bitterness developed in Parliament towards a scheme which menaced the sacred laws of trade, and it is not surprising that not only should Parliamentary pressure result in the creation of a new organ of Imperial control, the Board of Trade, whose functions will be considered later, but that fresh legislation should be passed completing and defining the system. The Act for Preventing Frauds and Regulating Abuses in the Plantation Trade[2] was prepared in part by Blathwayt, but bears much evidence of adoption of Randolph's suggestions. Under it after 25 March 1698 the import and export of the colonies including coastal and oversea trade was to be confined to ships of English, Irish, or colonial build and ownership, manned by a master and three-fourths crew of these places, to prizes condemned in Admiralty Courts there, English-owned and duly manned, and for three years to certain ships employed by the Admiralty in conveying naval stores from the colonies. The penalty was as before forfeiture of ships and goods, in equal portions to the Crown, the Governor, and the informer who might sue in any of his Majesty's Courts of Record at Westminster, or in any Court in the plantation where the offence was committed. Governors and Commanders-in-chief in the colonies were to take the oath to carry out the Acts of Trade on penalty of removal and a fine of £1,000, the provision applying to all Governors including those of the chartered colonies. Naval officers appointed by the Governors were to be made more responsible by being required to give security to the Commissioners of Customs for the due performance of their duties; until this was done, Governors were to be personally liable for their defaults. A further new provision applied to the colonies; the stringent provisions of the Act 14 Chas. II c. 11, regarding the visitation and seizure of ships and goods entering or leaving English ports. Under it officers of customs might board any ships, including warships, either entering or leaving, seize goods prohibited or uncustomed, and uncustomed goods could be seized after clearing. Further, under the authority of a writ of assistance from the Court of Exchequer officers could call upon a public officer, and enter houses or ships or warehouses and, if resisted, break doors, and take thence any prohibited or uncustomed goods. Penalties were provided against any persons helping to conceal goods or resisting officers, who were to be entitled to like assistance in the execution of their office as was provided under English law. To meet the habit of forging cockets, certifying that bonds had been given in England or the plantations, a fine of £500 was imposed. Express power was given to the Treasury and the Commissioners of Customs to establish officers at any port or place in the dominions, and jurors in any case as to illegal importation or exportation were to be natives of England, Ireland, or the plantations only, while the officer or informer was given leave to allege such venue as he thought proper. There were similar rules as to the nationality of persons holding places of trust in courts of law or in the business of the treasury in the colonies. Only men of means were to be accepted as sureties on bonds, and they were to fall due unless certificates were presented within eighteen months of due landing of the commodities mentioned in the realm or the colonies. Colonial products must not be landed in Scotland or Ireland until after they had duly been landed in and paid duties in the realm. Proprietors of territory must sell only to English subjects; their Governors must be approved by the

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[1] Stock, ii. 340 ff., 472–515; J. S. Barbour, *William Paterson and the Darien Company* (1907).

[2] 7 & 8 Will. III, c. 22; Stock, ii. 158, 160, 162 f., 165–73.

Crown, and must take the same oaths as royal Governors, before entering on their duties. Finally a register of shipping was provided for, under which in the colonies proof of build and ownership was to be made before the Governor and a principal officer of customs.

To render the Act effective was the chief desire of Randolph, and he pressed energetically for the use of the clause as to proprietary Governors to secure the appointment of men prepared to carry out the laws of trade, to compel the taking of oaths—on which far more stress was laid then than now seems natural, for the creation of Admiralty Courts with judge, register, and marshal, and for the appointment of Attorneys-General to act for the King in the colonies. No undue haste was shown in action by the Board of Trade; the proprietors were allowed to adduce objections against the idea of erecting Admiralty Courts, which they very readily did, urging that the charters gave Admiralty jurisdiction, while Trevor A.G.[1] reported on 2 December 1696 that the King had the right to create Admiralty Courts in any part and could authorize the Admiralty to issue commissions. Eventually the Board of Trade obtained the royal approval of the proposal, in the final form of which the office of Advocate in the Admiralty Court was combined with that of Attorney-General for the King's pleas, though the appointments came from different sources, the Advocates being appointed under deputation from the English Judge in Admiralty under authority from the Admiralty Board, while the Attorney-General was appointed under the great or privy seal. The question of the court to which appeal might be brought from these courts was decided in the first instance by the Board of Trade in favour of the King in Council,[2] but two years later Northey A.G.[3] reported that appeals should lie to the High Court of Admiralty in England, and this practice was reckoned legal and proper by R. West,[4] the legal adviser of the Board in 1720. On 22 April 1697 the King sent commands to the proprietors and Governors demanding strict obedience to the laws of trade, and threatening Connecticut, Rhode Island, and Pennsylvania with further steps if the orders were not obeyed, while the proprietors of the

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[1] C.C. 1696–7, pp. 238, 240 f.

[2] C.C. 1685–8, pp. 268, 378, 381 f., 384, 398.

[3] Chalmers, *Opinions*, ii. 227, 228.

[4] Ibid., 208.

Jerseys were distinctly menaced. Penn was quite unrepentant under rebuke and put forward the interesting suggestion that all intercolonial trade should be free, which of course was impracticable at that time in view of the divergent policies and interests of the colonies.

The Courts of Admiralty thus set up in the colonies were grouped by districts as suggested by Randolph, and from the first they were faced with serious prejudice. Their jurisdiction in matters of trade was in excess of that enjoyed in England, and in the colonies they were utterly unpopular. The proprietors claimed that the mention of jurisdiction by sea in their charters gave them Admiralty power, and the chartered colonies relied on the right to appoint judges. The common law courts were, as in England itself, only too ready to issue prohibitions and to entertain actions against judges in Admiralty, and the colonies unanimously protested that they were wronged in being deprived of the right of trial by jury, or in other words resented being deprived of the right of being acquitted by partial juries of fellow violators of the laws of trade. In Pennsylvania Quary as judge in Admiralty had an exciting time, for an Act was passed in 1698 commanding that Admiralty matters should be tried in the ordinary courts with juries, and Quary was unable to act until it had been vetoed by Penn and disallowed by the Crown.[1] Penn was called upon to remove Markham and Lloyd, the two leaders of the opposition to Admiralty jurisdiction being exercised, which he duly did. But Penn found the province bitter against the Admiralty jurisdiction, and he turned over to their support by setting up a claim that Quary could not exercise his jurisdiction on the rivers in the counties, thus reducing Quary to go down to the capes of the Delaware. Issue between the two was soon joined before the Board of Trade in connexion with the proposal to destroy all the proprietary charters. Elsewhere also the Admiralty jurisdiction had been met with hostility. In 1698 the Governor of Rhode Island refused to give effect to the commission of Admiralty presented to him, and, though an Act was passed to deal with pirates, commissions continued to be given to privateers. In the following year an apology was sent by the new Governor promising amendment of obedience to the law, but he in August urged the legislature to make preparations to resist and to avoid the bondage which had fallen on other colonies.[1] Atwood, Chief Justice of New York, was appointed Admiralty judge for New England, but he reported that Connecticut disputed his commission and would take care that in effect he had no chance of executing it, while at Boston, when he pronounced sentence against a collector who allowed the importation of goods illegally brought from Europe, the superior court treated him with discourtesy and suspended execution of his sentence.[2]

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[1] C.C. 1697–8, pp. 395, 398, 402 f., 483, 578; 1699, pp. 83, 118, 223, 247, 328, 384, 399, 418, 436.

The chartered colonies were equally recalcitrant in the matter of the obligation of their Governors to receive royal approval and to take the oaths. The Attorney-General admitted in 1700 that by lack of care in drafting no provision existed to secure that Governors were first presented for approval, and the chartered colonies did not dream of doing so. The royal Governors of New York and Massachusetts were charged with seeing to the oaths but did not act, and, while they were occasionally taken, they were also omitted and bonds were not given. In the case of the proprietors pressure was rather more effective; Penn obeyed the rule as regards Hamilton in 1701, and the Carolinas also complied.

It is not surprising that the attitude of the chartered colonies and the proprietors should have induced the Board of Trade on the basis of advice given by Randolph to formulate on 26 March 1701[3] a most formidable indictment against these colonies. These colonies had failed to satisfy the purposes for which such great land grants had been made. They had not carried out the laws of trade, had failed to submit their Governors for approval, nor had the oaths been taken. Laws had been passed repugnant to English law, and hostile to English trade. They had failed to send home laws or had done so imperfectly. They had denied the right of appeal, thus depriving their inhabitants of the safeguards enjoyed in royal provinces. They were the refuge of pirates and illegal traders, the receptacles of smuggled goods, and the source whence goods were illegally exported to foreign countries. They harboured runaway slaves and debtors. They injured colonial trade by their arbitrary manipulation of coinage, and they exempted their inhabitants from payment of customs imposed on others. They were encouraging the manufacture of woollens and other commodities instead of developing suitable products. They failed to provide for their own defence by erecting forts or storing arms and ammunition. They did not maintain a regular militia and there were no common arrangements for defence. The only remedy available was the cancellation of the charters by Parliament. The King in Council accepted the report, and on 24 April a Bill was presented to the Lords to take back the power of government into the royal hands, preserving territorial rights and leaving the laws unaltered until new laws should be passed by the Assemblies. Simultaneously the Board of Trade presented the House of Commons with details of its charges: Rhode Island was accused of claiming by her charter independence of England; Connecticut with refusing to allow appeals as in the *Hallam* case and in the Governor's declaration that appeals would not be permitted; Pennsylvania had opposed the jurisdiction in Admiralty and allowed unlawful trade; the Jerseys were in utter confusion and the laws of trade were neglected; the Carolinas and Bahamas were charged with piracy and the misconduct of their Governors.[1] But though the second reading was passed, time prevented further progress in 1701, and in 1702 Manchester, as Secretary of State, suggested a much less important measure, under which control of military affairs, the customs and the admiralty business should be taken into royal charge, the other civil matters remaining as they were. The Board of Trade did not think the proposal at all adequate, but the death of the King intervened before any decision was arrived at.

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[1] *Am. Hist. Ass. Rep.* 1903, i. 266.

[2] C.C. 1701, pp. 588, 706 ff.

[3] *Am. Hist. Ass. Rep.* 1903, i. 286 f.

Something, however, was done to control the licence of the colonies. Piracy was rampant and connived at generally, and an effort was made in 1700[2] to discourage it by providing more effective means of punishment. In the Admiralty Courts it could be dealt with by civil law, but that required a confession or eyewitnesses for a condemnation, and, therefore, resort was rather had to the procedure under 28 Hen. VIII, c. 15, under which pirates might be tried by common law procedure under commissions from the Admiralty in an English county, though it was necessarily difficult to secure the presence in England of the requisite evidence. The new Act made provision for trial in the colonies by commissions under the great seal or the Admiralty seal addressed to naval officers or other persons in the colonies. A quorum of seven was requisite, one of whom must be a Governor, commander of a ship of war, or a Councillor, and others might be Admiralty judges, customs officials, naval or mercantile marine officers. Punishments could be inflicted as under the English act. The Act was to be in full force in the chartered colonies, and disobedience to it was to work revocation of the charters. But trials of persons who concealed or aided pirates were left to the procedure under the Act of Henry VIII. Larkin, who was sent out with commissions in 1701, was not welcomed, and ended his mission by a quarrel with the Governor of the Bermudas and being thrown into prison. Piracy seems not to have been much affected by the Act. Another statute of the same year[1] provided for the punishment in England of any Governor guilty of oppression in his government, but this was not a very serious danger to a Governor in a chartered colony who was not likely to risk a visit to England if he had any cause for anxiety.

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[1] Stock, ii. 398 ff.

[2] 11 & 12 Will. III, c. 7; made permanent 6 Geo. I, c. 19; Stock, ii. 319, 336, 361 ff.; West, Chalmers, *Opinions*, ii. 201–5.

Of vital importance, on the other hand, was the inclusion of the colonies in the great Act of 1699[2] which succeeded in ruining the Irish trade in linen exports. The Board of Trade argued simply that the aim of the colonies was to furnish products which were not competitive with those of England, whereas the manufacture of woollens had reached in New England dimensions menacing English trade, and tending to reduce the value of land. After restricting Irish trade the Act provided that from 1 December 1699 no wool or woollen goods should be laden on any vehicle to be exported from the plantation where they were produced, subject to the same penalties as in the case of Ireland. Offenders could be prosecuted at Westminster and officials were to carry out the law. Further, in order to remove temptation to the colonies to proceed with manufactures, in the following year[3] a heavy duty levied on exported woollens was duly removed, thus diminishing any hardship which the Act might have caused. In point of fact, so slight was the export trade in wool and woollens that no grave injury was inflicted as in the case of Ireland, and indeed the policy agreed well enough with the aims of certain of the colonies which already had legislated to discourage the exportation of such things as wool, iron, and leather, which were used in manufactures. But the policy of strict subordination of colonial to Imperial interests was none the less marked.

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[1] 11 & 12 Will. III, c. 12; Stock, ii. 362–4, 369–72.
[2] 10 & 11 Will. III, c. 10; Stock, ii. 261 ff., 296–8.
[3] 11 & 12 Will. III, c. 20.

There must be noted also the unmistakable determination to make Imperial legislation the overriding law of the colonies. It is expressed in the section above quoted of the Navigation Act of 1696, which annuls any legislation past or future of the colonies which is repugnant to the Act, and the Act of Settlement[1] is enacted for the dominions of the Crown no less than for the realm itself. The position of the sovereign is sufficiently well brought out in the new form of coronation oath; the new sovereigns were 'to govern the people of this Kingdom of Great Britain and of the dominions thereunto belonging according to the statutes in Parliament agreed on and the respective laws and customs of the same'. For Ireland as for the colonies Parliament under William III was active in enforcing its supremacy, and William showed no little autocracy in his attitude.

In the same spirit the Imperial government regarded unfavourably every attempt by the colonies to strengthen the constitutional position of the Assemblies and to assert by law their right to English liberties. Virginia in 1691 vainly renewed the request for a Charter such as Charles II had almost granted in 1675. New York in that year sought to enact a measure stating the rights and privileges of its people; Massachusetts in 1692 provided for general privileges and in 1694 declared the House of Representatives entitled to all the rights of an English Assembly, while it sought to introduce the Habeas Corpus Act, as did South Carolina. Maryland claimed in 1692 to enact Magna Carta, and in 1696 to put in force all the laws and statutes of England affecting rights and liberties.[2] The disallowance of all the measures at once illustrates the adoption as normal of a new weapon of control, and the acceptance of the principle that the prerogative and the supremacy of Parliament must not be limited by claims of liberty, or exemption from taxation save by the local Assembly which might imply a negation of Parliamentary authority. Coupled with disallowance was the extended use of the right of admitting appeals as a mode of controlling the administration of justice and asserting the duty of obedience to Imperial legislation.

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[1] 12 & 13 Will. III, c. 2. So by 1 Anne, c. 2, s. 6, commissions of American officers were continued operative for six months.

[2] A.P.C. ii. 841 f., 837.

2. *The Settlement in Northern America*

The news of the revolution in England resulted in a happily bloodless revolution in the Dominion of New England, proving the weakness of a government resting on no popular support and without any serious military or naval force of its own. It must, however, be remembered that Andros was unquestionably not in sympathy with his master's religious policy, and that his attitude may not have been unconnected with this fact. At any rate, on 18–20 April 1689 the new government was completely overthrown at Boston, and in May by the decision of a convention the old constitution was to be resumed. Similar action was taken contemporaneously in Rhode Island, Connecticut, and Plymouth; the charters of the first two had never been formally vacated, and the third had no charter. By all the colonies the new sovereigns were declared as having acceded, and loyal addresses were sent in expectation of the formal approval of the return of the chartered rule. Massachusetts had at this moment in England Increase Mather, who had gone thither in May 1688 in the effort to secure from James II the restoration of the charter and the confirmation of land titles, and who had met with a favourable reception. He now was active in agitating for the restoration of the charter and succeeded in preventing the sending of orders to restore the deposed government, though orders were dispatched for the honourable dispatch home of Andros and the other prisoners of the revolutionary government. A long period of discussions now ensued. The hopes of the representatives of Massachusetts were for a time high, for it was believed that Parliament would legislate to restore charters generally and that the colonial charters would be thus restored, but this hope was defeated. Efforts to obtain the intervention of King's Bench to annul the *scire facias* of 1684 equally came to nothing, and the agents for the colony were compelled to fall back on efforts to persuade the King to restore the fallen governmental system which was now *de facto* revived. On the other hand, Randolph pressed on the government the old arguments from the neglect of New England to enforce the laws of trade, and pressed the now very obvious inability of the colony to act effectively on the northern frontier. It was impossible to ignore the force of this reasoning or merely to restore the old régime. Nor could any attempt be made to press the charges against Andros, who defended himself by the perfectly true argument that he had simply obeyed his commission, beyond which an officer of his temperament neither could nor would go. William III, though ready to meet colonial views, was none the less too deeply interested in defence to be ready to see Massachusetts a chartered colony under an independent Governor, and decided that he must retain the appointment of the Governor, and that the latter must have a negative voice.[1] Hence the charter of 7 October 1691 represents a compromise, which on the whole was in favour of the colony, but which none the less was regarded as sadly disappointing by the theocracy, who could not accept as convincing the arguments urged in its favour by Increase Mather.

In point of fact the new constitution[2] was one of a very much more dignified type than that of 1629, which after all was a mere charter to a company, and which if pressed did not really grant either high judicial powers or the right to have an Assembly and to exercise sovereign rights of any kind. Moreover, the extent of the area allotted was far greater than was given in 1629. Maine and Plymouth as well as Nova Scotia and the territory between Maine and Nova Scotia were all incorporated with Massachusetts proper into a Province of Massachusetts Bay, and to the inhabitants were granted all the lands in question. At the same time by a vital provision all existing estates were safeguarded, and the issue of new grants raised by Andros was for ever settled by the provision that no grants should be invalidated whether to towns or other bodies or persons by any defect of form. The Crown by this concession parted with the possibility of raising a revenue from quit-rents from the land of the province. Even as regards future grants no effort was made to reserve rents for the King, or thus to build up a revenue which would render the Governor independent of the pleasure of the legislature. New Hampshire was not included in the province, but the intention to make the Governor of Massachusetts also Governor of that colony minimized the change.

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[1] A.P.C. ii. 124–7; C.C. 1689–92, nos. 25, 28, 37, 1277, 1675, 1769.

[2] Macdonald, *Charters*, pp. 205–12; Thorpe, iii. 1870–86.

The constitution granted provided that the King should appoint the Governor, Lieutenant-Governor, and Secretary of the province; that there should be a Council of 28 members, and an Assembly. The Council was to consist of 28 members, seven to be a quorum with the Governor, and to advise and assist him in the business of government. It was to be annually elected by the General Court, which meant that, against the wishes of the colony, the Governor had a negative voice. Of the members 14 must be from Massachusetts, 4 from New Plymouth, 3 from Maine, and 1 from the lands between the Sagadahoc and Nova Scotia.[1] The Assembly was to be summoned for the last Wednesday each May and to consist of two representatives from each town or place, the electors being the freeholders and other inhabitants of the place. The franchise was fixed at 40 shillings freehold or the possession of £40 value of other estate. The General Court was to consist of the Governor, Council, and the deputies, and the power to adjourn, prorogue, and dissolve was given to the Governor, while all members must take the oaths prescribed in lieu of the oaths of supremacy and allegiance by the Act of 1689 (c. 8). To the General Court was given the power to remove members of Council and fill casual vacancies. The appointment of judges, commissioners of oyer et terminer, sheriffs, provosts, marshals, justices of the peace, and officers of justice and of the Council was assigned to the Governor and Council. To the General Court was given the power to erect courts of civil and criminal jurisdiction, leaving matters of probate and administration to the Governor and Council, against the earnest objections of the colony. Appeals were to lie from judgements in personal cases where the value exceeded £300, provided that application were made within 14 days and security given to meet the debt or damages together with such costs or damages as might be awarded on appeal, but execution was not to be suspended by reason of the appeal, if the appellee gave due security.

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[1] Nova Scotia was given back to France in 1697. For Sagadahoc see A.P.C. vi. 225–30.

The legislative authority granted was of the fullest type, in striking contrast to the limited concession of 1629. It extended to making laws of any kind, not repugnant to the laws of the realm, to selecting annually all civil officers whose appointment was not expressly reserved, and the determination of their duties, the imposition of fines, mulcts, imprisonment, and other penalties, and the imposition of all forms of taxation on the estates and persons of all proprietors and inhabitants. All expenditure must be under warrant of the Governor with the advice of the Council. In all matters, whether of the General Court or the Council, the Governor must have a negative voice, and without his written approval no elections or orders or acts of government were to be valid. Further, all Acts were to be sent to the King to be approved or disallowed; disallowance must take place within three years after submission to the King in Council; otherwise, laws could only be repealed by the General Court.

The usual powers of mustering and arming men were conferred on the Governor but subject to two express restrictions, namely, that no person could be moved outside the province save with his express assent or the approval of the General Court, and that martial law could be exercised only with the approval of the Council. The latter provision was indeed common form, but it was vitally different in that the Council was elective. There were reserved two matters. All Admiralty jurisdiction was retained, and for the sake of naval defence there were reserved for the Crown all trees not growing on lands already granted to private persons which had a diameter of 24 inches at least at 12 inches from the ground. This action was, of course, largely motived by the constant preoccupation of the government with the possibility of securing the growth of naval stores in New England, as a means at once of relieving England of her inconvenient and dangerous dependence on the Baltic lands and of removing any incentive to New England to engage in manufactures to the detriment of English trade and the departure from the Imperial system of trade.

Finally, freedom for all Protestants was laid down as a principle.

It was, of course, in itself of no special value, but it was made gradually effective by the change in the franchise; there could be no question now of freemen permanently compelling non-Congregationalists to contribute to the support of their churches[1] and to attend on pain of fine. The mercantile community also now came into its own, for the franchise was not restricted to freeholders. From the point of view of Imperial control the constitution contained the seeds of decay. The cleavage of interests between freemen and non-freemen of the Company disappeared for good, and there was presented the possibility of a development in which a united opposition would be opposed to English action tending towards the damage of colonial trade. Moreover, the resistance would no longer be that of a petty corporation, with limited legal borders, no right to create an Assembly or to exercise higher judicial functions, but of a powerful colony. Nothing was done to secure the maintenance of English legal principles; the grant of power to erect courts meant that the courts would proceed largely on their own lines, for the appeal to England never could be a serious factor in enforcing obedience to English legal principles, and the power of legislation was certain to be used with little heed for the order of non-repugnancy to English law, which it was difficult to interpret and everywhere was much of a dead letter. Control over trade was not to be expected to be improved under the new régime to any substantial extent, for, though the Governor was now royal, the whole of the colonial executive was essentially local. It is true that the Council was dependent on the Governor in that he had a negative voice in its selection, but that was a very poor substitute for the normal right of nomination. By it in the ordinary royal government the Governor was sure of having a body which in executive and legislative matters would act as a buffer between him and the Assembly. In Massachusetts he could prevent the inclusion in it of extremists, but he must have elected members and they essentially reflected the views of the country rather than of England. Moreover, the military power of the Governor was seriously limited by its strict reduction to local defence unless the General Court gave sanction or the men volunteered. Time was to show that as regards trade and military matters alike the Governor had been placed in a losing position.

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[1] Quakers in 1727, Baptists in 1731, Anglicans in 1735 received exemption from compulsory contributions, reimposed by Acts from 1692–5.

Nor was Massachusetts fortunate in its first Governor under the new régime. Phips (1692–5) showed a complete inability to co-operate with the Collector of Customs and the navy, insulting Capt. Short of H.M.S. *Nonesuch* and quarrelling with his fellow Governor, Fletcher of New York. The objections to the breaking up of the Dominion from a military point of view were seen conspicuously in his régime, for in 1693 he ignored New Hampshire in concluding peace with the eastern Indians, and Rhode Island declined to respect his commission of supreme military command.

In New York the revolution was attended by unhappy circumstances. Rumours of French and Indian attack and of a Popish plot spread rapidly among the mainly Dutch elements of the people; though meetings of councillors, city officers, and train-band captains in April and May 1689 were convened for defence and co-operation, the latter seized control and under Jacob Leisler overthrew the administration, Nicholson tamely retiring to England, leaving the aristocratic, mainly English, faction under Bayard and Van Cortlandt to make head against Leisler, whom they stigmatized as a rebel, while he claimed to be acting for William III. A Convention of 26 June gave some colour of legality to his position, but Albany held out against him, until the fall of Schenectady in February 1690 forced it to submit in fear of the French and Indian advance, now unhindered. An Assembly was summoned by Leisler in April 1690, but his rule remained military, supported by arbitrary imprisonment and taxation. William III in the meantime had commissioned Col. Sloughter as Governor, conceding a representative Assembly, but the Governor's arrival was delayed, and Leisler unhappily did not feel able to accept the authority of Ingoldesby, who arrived with troops in February 1691, a conflict in which two soldiers were killed occurring on 17 March. Sloughter's arrival with superior forces on 19 March was followed by Leisler's surrender and trial for high treason; he refused to plead, alleging that he had acted under authority of the King's letter of 30 July 1689, which, however, was clearly intended for the Council which the King presumed was governing after Nicholson's departure. Sloughter, despite Leisler's appeal to the King, after respiting sentence of death, weakly yielded to Bayard's clamour and had Leisler and his chief lieutenant Milborne executed, imparting grave bitterness to New York politics. Tardy reparation was made by Act of Parliament in 1695 reversing the attainder of both men, who certainly were not guilty of treason to William.[1]

Sloughter and, on his death, Fletcher from 1692 were confronted with the problem of defence, aggravated by the refusal of Massachusetts under Phips to help and of Connecticut, transferred to Fletcher's control in 1693, to recognize his military authority,[2] while New Hampshire was impotent and the Jerseys in confusion. The Assembly also criticized Fletcher's management, and in 1694 denounced his failure to keep under arms the numbers provided for and his waste of funds. Royal mandates to the colonies for quotas of men and money in 1692 and 1694 elicited a nominal response. Even Massachusetts at the close of 1696 suggested that further naval and military defence was needed against French and Indian attack, and Penn evolved a scheme under which two commissioners from each colony should meet at New York annually under a royal representative to discuss means of supporting colonial union and defence and adjusting difficulties as to fugitive criminals and debtors and injuries to trade. Men and money would be much more easily procured by intercolonial agreement than by orders from overseas. This wise project proved unattractive to intercolonial jealousy and particularism, despite its appeal to dislike of Imperial intervention. Discussions by the Board of Trade and colonial agents in 1697[3] showed the difficulty of any union. New Hampshire's defence interests were not those of Massachusetts; New York objected to any centralization at Boston, insisting on her diverse trade interests and the necessity of spending her money at home. Connecticut insisted on retention of local command and refused to allow any commander-in-chief to remove her forces from the colony. Eventually the view of Massachusetts was accepted: Bellomont, an Irish peer of ability, was made Governor of Massachusetts, New Hampshire, and New York, with head-quarters in New York, and Captain-General of Connecticut, Rhode Island, and the Jerseys, pending consideration of the legal issue of giving civil control over these colonies also.[1] The absence of war in Bellomont's rule, 1697–1701,[2] prevented the testing of the military value of the scheme, and his life was spent in fighting pirates, including the capture of Kidd, in seeking to enforce the laws of trade, to combat ineffective government, and arrange co-operation in defence.

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[1] Stock, ii. 113–15, 117 ff.

[2] C.C. 1693–6, pp. 193 ff.

[3] C.C. 1696–7, pp. 318, 338 f., 351 ff., 384.

In New York his supersession of Fletcher left him with a hostile Council and his Assembly in 1698 was anti-Leislerian and unfriendly; he dissolved it and secured a Leislerian body of 16 out of 21 members which he managed skilfully, inducing it to refrain from interfering with his prerogative right to fix fees. In 1700 he succeeded in inducing it to rescind its original measure providing £1,000 for a fort in the Onondaga country by a levy on European imports and entrusting control to commissioners, and to substitute a direct levy, omitting the commissioners. A six-years revenue Act with £1,500 for the Governor was obtained, and an Act to cut down the monstrous land grants of Fletcher's corrupt régime ultimately became effective in 1708 though it effected little. His efforts to improve legal administration led to the sending from England of a Chief Justice and Attorney-General with small Imperial salaries. In Massachusetts, where he spent May 1699–July 1700, there was resistance to appeals in customs cases, a demand for an elective governor, hostility to the laws of trade and to Imperial control over laws, which was largely evaded by enactment for short periods with re-enactment ere or immediately after disallowance, a practice Bellomont was instructed to forbid. He secured a settlement of the judicial system, three earlier Acts having been disallowed, the first for restricting appeals to personal cases, the second for making the pecuniary limit decisive, and the third for demanding juries in all cases, overriding Admiralty procedure; the new measure eschewed these issues. The Act to incorporate Harvard having been disallowed for not giving power to the King to appoint visitors, he suggested that the Governor and Council should act in this capacity. Tacking was in full force; in New York he himself allowed the Act resuming lands to include a clause depriving an unpopular clergyman of his benefice. New Hampshire had been in confusion before Bellomont; Allen had bought up Mason's claims to ownership and secured appointment as Governor in 1692, delegating authority to his son-in-law Usher. Bellomont's commission vacated that of Allen and Partridge was made Lieutenant-Governor, but in the absence of any one authorized to administer the oaths his appointment was contested by Usher as invalid. Bellomont regularized the position and defeated Allen's efforts to secure a decision in favour of his land rights by removing the judges appointed by the late régime. Allen's claim failed before the court, but a refusal to allow an appeal brought strict injunctions from the King that the Governor was to secure that appeals were allowed in all his governments. The appeal was by advice of the Board of Trade admitted, and Privy Council decisions in 1702 and 1708 established the invalidity of the claims, leaving the royal claim to the land unquestioned.[1]

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[1] For military command see C.C. 1693–6, p. 316. Cf. 13 Chas. II, stat. 1, c. 6, preamble; Cornbury, N.Y. Col. Docs. iv. 912; Chalmers, i. 31 f.

[2] Commission and instructions, C.C. 1696–7, nos. 910, 911, 940.

The resolution was followed in both Connecticut[2] and Rhode Island[3] by the resumption of the old constitutions, though not without doubt in the latter case. Both governments firmly declined to allow exercise of military command whether by Fletcher, Phips, or Bellomont, both failed to render any military aid of value to New York or Massachusetts, but Rhode Island permitted appeals, which Connecticut denied, even after the peremptory order of the King in Council on 9 March 1698 in *Hallam's* case, asserting the inherent right of the King to hear and determine appeals from all the American colonies.[4] Fletcher reported that some of the wisest denied that the laws of England bound them, as they did not vote for members of Parliament. In Rhode Island Clarke refused to give effect to the commission of Admiralty presented to him by Sanford, and Bellomont found the administration in disorder, taxes illegally raised, irregular summoning of the legislature which sat also as a court, breaches of the Charter, and harbouring of pirates like Tew, inadequately excused by lack of fortifications to compel obedience to the laws of trade. Ample grounds, it is clear, existed for the proposal of 1701 to resume the Charters for malfeasance.

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[1] A.P.C. ii. 365–7.

[2] C.C. 1689–92, no. 2477; 1693–6, no. 649.

[3] C.C. 1693–6, nos. 108, 524; 1699, nos. 929, 1002.

[4] Macqueen, *House of Lords*, p. 805.

The revolution restored New Jersey to its chaos of twenty-four proprietors in the East and the whole body of freeholders as proprietors of the West. Hamilton as Governor of both Jerseys from 1692 to 1697 was successful, obtaining from East Jersey in 1692 and 1696 aid for New York, under the ruling of Trevor A.G. that the Duke of York's grant could not sever connexion with New York so completely as to free Jersey from the duty of aid in war. His supersession by Basse was due to the erroneous belief that as a Scot the Navigation Act of 1696 barred him from office. Basse worked with the Anglican faction to secure royal rule as a distinct colony while Bellomont sought to enforce New York's supremacy, and to carry out his instructions that all vessels going up the Hudson must pay duties at New York. The Board of Trade held extreme views; as against Sir C. Levinz, who advised that the Jersey proprietors had power to appoint ports and levy customs, it interpreted an opinion of Trevor and Hawles of 18 October 1697, which merely ruled that even the Duke of York never had powers to appoint ports under the Navigation Act of 1673, as the Commissioners of Customs alone had that power, to mean that the Duke never had authority even in New York to establish ports for the raising of local customs dues, and still less could he grant power to New Jersey. The real issue was whether the Duke, who clearly had power in New York as had all the chartered colonies, could transfer such authority to the Jerseys, and this issue with the whole question of governmental power was unexpectedly decided in favour of the Jerseys by Holt L.C.J. in King's Bench in the test case of the *Hester*[1] in 1699–1700; the result was really inevitable in view of the prolonged royal acquiescence in proprietary government. But in *Jones* v. *Fullerton*[2] on appeal from the court at Perth Amboy in February 1697 the Privy Council gave judgement, though perhaps on a technicality, in a case which asserted that the holders of grants (such as the Elizabeth and Monmouth patents), made by Nicholls before the Duke's grant of the Jerseys was known, were not subject to the Jerseys. This threatened the integrity of the province, rendering the Assemblies doubtful and intractable, and in 1702 a formal surrender by both sets of proprietors was recorded in Chancery in favour of the King, and in December 1702 Cornbury, Governor of New York, was commissioned[1] for New Jersey. The twelve Councillors named in his commission were agreed on with the proprietors; there was to be one Assembly with equal representation from either province, and one Superior Court, to sit alternately at Burlington and Perth Amboy, and a full complement of officers was to be provided for either area. Cornbury was to obtain a revenue Act not limited in time, laws to secure the land rights and claims to quit-rents of the proprietors and forbidding purchases of Indian lands save by them, protection for slaves and servants and English creditors, a militia Act and aid for New York. Quakers were to be allowed to make declarations in lieu of oaths, and though cultivation was to be encouraged the obvious expedient of taxing unimproved land was forbidden. These instructions, it is hardly necessary to say, Cornbury failed entirely to make effective, for royal commands had no terrors for the Assembly of the united New Jersey.

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[1] N.Y. Col. Docs. iv. 439, 605; N.J. Arch. ii. 251 ff., 404; Stock, ii. 354–6; 12 Mod. Rep. 399.

[2] N.J. Arch. ii. 189.

3. *Pennsylvania and Maryland*

It was inevitable, in all probability, that Penn's long connexion with the Stuarts should cause him to be suspect to William III, but in the decision for the time to suspend his exercise of control of his province must no doubt be seen also the determination to seek to secure further uniformity in government. Moreover it was clearly desirable, in view of the war, that Pennsylvania should be induced to lend more steady aid than could be expected under the proprietary rule. Accordingly in 1692 Pennsylvania was included in the scope of Fletcher's commission. Nicholson in 1691 had suggested that this was necessary, and apparently there was some apprehension lest the Quakers should communicate with the French and the Indians and aid them in war for the sake of the support which Louis XIV was giving to the exiled monarch. Fletcher was duly proclaimed, and appointed William Markham, formerly Secretary of the province, as his Lieutenant-Governor, but Penn protested vigorously at the injustice done him. Fletcher found apparently that his commission was opposed by the Quakers, and held that this was due to incitement by Penn, though the fact that the Assembly would not give the aid asked for must be regarded as perfectly natural in view of the normal lack of willingness among the colonies to aid one another in war. The Law Officers, when consulted, advised that in emergency it was legal for the King to grant an overriding commission such as had been conceded to Fletcher, but that on the cessation of the cause the rights of the proprietor revived. The Lords of Trade then summoned Penn to state what he would consent to do if his powers were restored. Penn agreed to proceed in person to the province, transmit royal orders, secure quotas for the defence of New York, maintain Markham in office, and surrender the government to Fletcher if the royal orders were not obeyed, and carry out Fletcher's acts in 1693, besides subscribing a declaration of fidelity to the sovereigns. Penn pointed out also that the legislature had passed an Act of submission to the royal government. He was therefore restored to the government of his province, Fletcher being given the right to call on the colony for eighty men and for aid in the defence of New York.[1]

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[1] N.J. Arch. ii. 489–500, 506–36.

Fletcher's term of office was accompanied by an important change in the form of the legislature for the time being, from which a valuable right accrued to the lower house. He insisted that the Frame of Government fell to the ground and accordingly he nominated, subject to royal approval, his Council and reduced its numbers, thus necessarily negating the old rule that the lower house might only approve or disapprove legislation laid before it. Fletcher further declared that he could not accept the contention of the Assembly that all the existing laws remained in force, especially when repugnant to the laws of England, as were many criminal laws, the laws of inheritance and of marriage, and the privileges of the proprietor. He succeeded in scoring a point over the Assembly, because it turned out that the law had not been passed under the great seal as required by the Charter, and the Assembly finally met his views by drawing up a revised petition of right, as it was called, in which 86 measures, in place of the original 200, were set out as representing existing law to be followed pending an expression of the royal pleasure. In 1694 Fletcher found the Assembly, as in the previous year, wholly unwilling to obey the orders to aid in the defence of New York, and it sought in the supply bill to name a Treasurer in lieu of the royal Receiver-General, with the result that Fletcher departed without the bill.

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[1] C.C. 1689–92, no. 2667; 1693–6, nos. 395–7, 660, 1127, 1138, 1181, 1238, 1251.

Markham on Penn's restoration to authority restored as far as he could the Frame of Government including the elected Council, but in 1695 the two houses endeavoured to take matters into their own hands, and to admit the initiative of the lower house. A supply bill was therefore coupled with an Act of Settlement to establish the principle, but Markham refused to assent, as the Frame was thus violated. In the following year, however, he agreed to the proposed right of initiative to the Assembly and thus Markham's Frame of Government[1] came into existence. It is, however, clear that Penn never approved it and that, therefore, it never was finally binding on him. He actually returned to the province in 1699 and remained until 1701, during which time elaborate discussions took place regarding the constitution and the position of the three Delaware counties which were more and more unwilling to remain part of Pennsylvania. In the ultimate issue, in view of the unrest and the efforts then in progress to vacate all proprietary charters, a settlement was reached in the shape of the Charter of Privileges, 28 October 1701.[2]

This interesting instrument first concedes to every one who acknowledges God and is willing to live under civil law full enjoyment of religious liberty, and grants the right of enjoyment of executive and legislative functions to all Christians who will take the promise of allegiance to the King and fidelity to the proprietary and Governor and take the attests provided in an Act of 1700. Section 3 confers legislative power and other authority on an Assembly, which was to meet every year on 14 October at Philadelphia, unless the Governor and Council appointed another place. It was to be elected by the freemen, and to consist of four men out of each county, of most note for wisdom, virtue, and ability, or a greater number according as the Governor and Assembly might agree. The rules for elections were to be those of the Act of 1700 to ascertain the number of members and to regulate the elections. The Assembly was to have power to choose a Speaker and officers; to judge of the qualifications and elections of members; sit on its own adjournments; appoint Committees; prepare bills to be passed into laws; impeach criminals and redress grievances, and to have all other powers and privileges of an Assembly according to the rights of the freeborn subjects of England, and as is usual in any of the King's plantations in America. Two-thirds of the members were to suffice for the transaction of business. Further, at the time of electing their representatives annually, the freemen could choose two persons to present for the appointment of sheriffs and coroners in each county; the Governor must then in three days choose half the number, otherwise the first in the presentment would serve; casual vacancies were to be filled by the Governor. Clerks of the peace were to be chosen by the Governor from three nominees of the justices. Criminals were to enjoy the same privileges as to witnesses and counsel as prosecutors; no case affecting property was to be dealt with by the Governor and Council except on appeal; no tavern keeper might be licensed by the Governor save on presentment by the justices who might remove a licensee for misconduct; the property of suicides should descend to their relatives, and no forfeiture to the Governor should be occasioned by death by accident. The Charter was to be given a measure of permanence by being made unalterable save by the assent of the Governor and six-sevenths of the Assembly, but liberty of conscience was to be unviolable.

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[1] Macdonald, *Charters*, pp. 217–22.

[2] Ibid., pp. 224–9.

As an addendum Penn distinctly declared his willingness to allow of the separation of the legislatures of the Province and the Lower Counties if this should within three years be requested by the representatives of the Province and the Counties; in this case the Counties were each to have eight members in the Assembly and Philadelphia when incorporated two, while the Lower Counties would have such numbers as they desired. The Lower Counties would not for a moment consent to join forces with the Province, despite the arguments of Hamilton, and the position was acquiesced in, though both parts of the territory enjoyed a single executive.[1]

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[1] For the final settlement as to Penn's claim to Delaware against Baltimore see A.P.C. v. 100–8; vi. 236, 239–45, 469. The Crown's claims were never waived; see A.P.C. v. 302 (May 1771); Law Officers, 21 Oct. 1717 (Chalmers, i. 40–57).

The vital change in the new constitution was the omission of any provision for the election of a Council, and this was followed shortly by the issue of a commission creating a Council for purposes of administration. This body advised the Governor in his legislative capacity and discussed laws, but it never had the place enjoyed elsewhere by the Council of a regularly authorized second chamber whose assent was necessary to the validity of any measure.

When the revolution in England broke out, Baltimore was resident in England. He had found it necessary to leave the province in 1684 because of his boundary controversy with Penn, which concerned the Lower Counties, and in 1686, under the new policy of concentration, a *quo warranto* was taken out against him.[1] In 1687 orders were given for its prosecution, but James II probably liked his co-religionist too well to be willing to press the matter, for otherwise it is inconceivable that the issue should have been left undecided in this way. Baltimore showed his loyalty by causing the birthday of James III to be declared a holiday in the colony, where he had already quietly but effectively anticipated James II's policy of creating a Roman Catholic executive by filling all the important offices with members of that faith. Had he been there in person during the revolutionary period, he might well have conducted matters so as to avoid any trouble, but in fact his Council was not possessed of his tact, and its President Joseph was distinctly incompetent. At the opening of the Assembly of 1688 he demanded the taking once more of the oath of fidelity, and insisted that failure to take it was an offence punishable with fine, imprisonment, and banishment, thus merely irritating the Assembly. It happened also that, though Baltimore obeyed on 27 February the orders given to him to have the new sovereigns proclaimed, his messenger died, so that the news did not reach the province officially as from the proprietor, and only in September on receiving further royal commands was the error rectified. It is not surprising on the whole that rumours spread as to the government planning to overthrow the Protestants with Indian and French support. In July 1689 Coode and others revolted against the government, which could not make head against their disaffection, and in August an Assembly hastily summoned by the dissidents approved their action, and passed an ordinance for the administration of justice and continuance of the laws of the province. In April 1690 this convention again met and appointed a committee of twenty members with powers of government. The case against the proprietor had in the meantime been blackened by the murder by his relatives of Payne, the royal Collector of Customs. William III was not unwilling to recognize the *fait accompli*, which accorded well with the objection naturally felt to having a Roman Catholic proprietor in control. Holt C.J. in June 1690[1] greatly simplified the legal situation by declaring that, though it had been better if the offences of Baltimore amounting to forfeiture had been judicially established ere a royal Governor was appointed, none the less in case of necessity the constituting of a Governor by the King direct would be legal, but the Governor must be responsible to the proprietor for the profits. These included the territorial revenue, the tonnage dues, and half of the export duty on tobacco under the Act of 1679. Accordingly on 27 June 1691 a royal commission was given to Copley as Governor.[2] It followed the terms of that of Sloughter on appointment to New York, but with special instructions to secure the territorial and fiscal rights of the proprietor. Moreover, special instructions were given for the benefit of the Church of England in Maryland, for protection against the Indians, and for the establishment of ports and harbours. In accordance with the desire to keep a firm control on proprietary provinces Nicholson, Governor of Virginia, was to be Lieutenant-Governor to act in the event of Copley's death, and failing him Andros. The new régime was maintained for twenty-three years during the whole period when the representative of the Baltimores was a Papist.

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[1] A.P.C. ii. 30, 88.

Maryland thus was in a peculiar position, for the royal government was deprived of the quit-rents which might have helped it to a certain measure of independence of the Assembly, while any legislation or action likely to injure their proprietorial interest was certain to be objected to strongly by the Baltimores. Indeed at the outset the Assembly of 1692 was confronted with claims by the proprietor to which it objected. It endeavoured to deprive him of the tonnage dues which had been, it held, imposed for defence, and should not be paid when Baltimore provided none, but the King disallowed the Act. It held that fines and amercements since the royal government did not belong to Baltimore, and objected to his having escheats, while waifs and strays could not be claimed in a new country where English rules were inapplicable.[1] Darnall, Baltimore's agent, was imprisoned for failure to produce books to show the details of the revenues, and released only on promising to obtain permission to show books. Much more important was the decision, based on the Governor's commission and instructions and English practice, to refuse to allow Quakers to serve as they could not take the oath; this was the first exclusion of Quakers on this ground, and, when they objected later to taxation without representation, their plea was not accorded weight. On the issue of fees Copley proved willing to permit legislation of a comprehensive type by the Assembly instead of insisting, as the Council wished, on the right he had by his commission to fix fees with its advice. He assumed that this merely allowed him to lessen or moderate fees, and he thought the Assembly, when providing for services, could affix the charge to be made, while the Assembly claimed the right under Magna Carta, several statutes of England, and the practice of Parliament.[2] Fees afforded ground for a contest with Sir Thomas Lawrence, the Secretary of the Province, who was removed from office by Copley on the score of maladministration but restored after his death, which took place in September 1693. The Acts now passed were submitted for the royal approval for the first time in Maryland.

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[1] Chalmers, *Opinions*, i. 30.

[2] C.C. 1689–92, nos. 1288, 1307, 1317.

Under Nicholson (1693–9), Copley's successor in office, distinct progress was made with the tendency to increase the prestige of the Anglican Church and the identification of the people with the Crown. The capital was removed from Catholic St. Mary's to Annapolis, and in the main Nicholson managed his Assemblies well. On the issue of defence Maryland remained in effect deaf to every one of the urgent appeals sent by Fletcher and supported by royal mandates. The net result of all these efforts was £450 in 1695 and £133 in the following year; not a man was sent, and Nicholson himself seems to have been more concerned with the risk of French aggression on the Mississippi than with the northern frontier.

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[1] A.P.C. ii. 246–50 (Trevor, 2 Nov. 1692).

[2] Osgood, i. 360ff. Cf. A.P.C. ii. 532ff., 629 (1710).

The fact that much of the revenue of the province was raised by permanent taxation diminished the pressure for supplies from the Assembly, and incidentally gave greater power than usual to the Council, whose members were first nominated in Copley's commission. The Governor sat with the Council in its legislative business. The Assembly soon developed the practice of working through committees, for elections, laws, grievances—whence many bills emanated, and accounts. In the last claims were examined for work done for the province, and on this examination was based the public levy or supply bill which was prepared by a Committee of the lower house on the public levy. The Governor and Council proposed to take part in this work, but the lower house effectively declined to permit participation. But if the Council did not initiate money bills, it had the right to amend. Both houses acted in the election of Treasurers, one for the eastern, one for the western shore, and to both or a joint committee the Collectors and Receiver-General submitted their accounts. The initiative as regards the disposal of revenues voted was often in the hands of the Governor whose warrant authorized all expenditure, for appropriations were often imperfect and balances might be used for non-specified ends, nor were the burgesses at all active as a rule in countering the executive in these matters. More serious was a dispute in 1697–8 over the arrest of one Clarke who was a member of the lower house, which was inclined to treat the matter as a grave breach of privilege, but which ultimately allowed the Governor and Council to decide the issue, and on the eve of retirement from office Nicholson released Clarke on security for good behaviour. The laws of trade were, as usual, rather poorly executed, according to Randolph's bitter testimony; juries were partial and officers far from upright. Nicholson suggested exchequer courts for recovery of penalties, and was not persuaded of the sufficiency of Admiralty jurisdiction which the Board of Trade insisted on substituting despite his objections.

4. *Virginia*

Howard of Effingham's return to England left Virginia, under his deputies Nicholson (1690) and Andros from 1691, to resume its usual oligarchic government. The Councillors in that capacity, and as members of the General Court and Commissioners of Oyer and Terminer, enjoyed large emoluments, were closely connected by intermarriage and interest, and had a strong hold over the burgesses, which was aided by the Governor's power to appoint the clerk of the House and his patronage which was manipulated for political ends. A wide discretion belonged to the Governor and Council, which minimized the control of revenue and expenditure by the burgesses; thus though the Assembly only met in 1691 and the liquor tax imposed in 1686 expired in 1689, it is clear that it was still collected, doubtless under orders by Governor and Council. The quit-rents and the dues under the Act of 1673 were also available for the support of the government by royal permission and gave £800 a year, which helped to preserve Governor and Council from control by the burgesses. In Nicholson's Assembly they endeavoured to assert themselves; an impost on liquors was provided and an Act was passed to provide for ports and secure the customs, while the office of Treasurer was created, to be elected by the Assembly; he was to receive the new revenue and pay out only under warrants for purposes laid down by Act passed after claims for service had been examined in the Burgesses' Committee on Claims. This arrangement, however, did not become permanent. The Assembly also petitioned[1] the King for the grant of the privileges asked for under the proposed Charter of 1675; while the Board of Customs criticized the Act for ports as defective, and as imposing an unrelated and excessive duty on exported hides, and another Act to encourage the production of flax and hemp, partly as encouraging manufactures, but mainly for allowing payment of debts in commodities other than tobacco, and giving unfair protection of debtors. The Assembly in 1693 suspended the first Act, and the latter, being temporary, lapsed.

To appeals for military aid in men and money from Fletcher Virginia turned practically a deaf ear, urging that her resources must be spent on the unimportant and easy work of protecting the head-waters of the four rivers, the militia, and coast defence; small sums only were remitted, and an earnest appeal by the Council in 1695 based on the royal command and the moral obligation of mutual succour in national war as between English counties produced only £1,000 New York currency; thereafter small sums from the quit-rents alone could be sent, as the Assembly refused men or money.

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[1] C.C. 1689–92, pp. 551, 611.

Blair as commissary of the Bishop of London secured a royal charter for William and Mary College, and an Act of 1696 giving 16,000 lb. tobacco salary to Anglican clergymen. But his claims that the Governor had no right to appoint a minister to preach at Jamestown during his illness, and that ministers need only produce their orders before him and not the Governor and Council, resulted in his suspension from the latter body, though later he was restored by royal order.[1] As a Scotsman, however, he was held to lose his seat on the General Court under the Navigation Act of 1696.

5. *The West Indies*

While the revolution was not accompanied in the West Indies by any important movements, it doubtless helped to maintain the constant efforts of the legislatures to control the executive and defeat the laws of trade. In Barbados in 1690 the Governor had to forbid the Assembly to call the customs officers to account on charges of extortion, and in 1699 men-of-war were asked for to protect them, while the Governor had to secure the release from imprisonment of a collector proceeded against by persons whose illegal trade he had interrupted. Under Russell the Assembly insisted on approving expenditure, and induced the Treasurer to account to it, while a report to the Board of Trade in 1700 on the administration of justice in the American colonies and Barbados in special revealed a disgraceful state of judicial corruption which the Board sought to remedy. In 1691 Hallett raised against the Governor the issue of the legality of taking property for the purpose of fortifications except on payment of compensation, an issue decided only in our own times.[2]

In the Leeward Islands Codrington endeavoured to render the islands efficient against the French, and to promote federal action, but was confronted with particularism, which made Nevis refuse in 1689 to convey refugees from St. Kitts to Montserrat and induced Antigua in 1698 to denounce the federation as a cloak for refusing legitimate demands, and to demand command of the island forces for the Lieutenant-Governors as well as larger representation in the federal Assembly in which, under an Act of 1692, each island had three members, a majority of whom by dissent could prevent the application to the island of a federal measure.[1] The resistance promoted Codrington's suggestion of annexation to England and representation in Parliament, but his own acts were open to censure which his death in December 1698 prevented. The island legislatures by the power of the purse controlled in considerable measure the Lieutenant-Governors; questions of privilege evoked indignation; Antigua resented any questioning of words spoken in the Assembly, while Nevis quarrelled with the Council on the claim of the latter to swear only duly qualified members and with the Governor on his conduct of the war, resolving itself into a Committee of the Whole to consider the state of the country.[2] Codrington's son and successor records the violation of the laws of trade, the buying and selling of justice, the protraction of chancery suits, and the oppression of the poor.

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[1] Osgood, i. 346 ff.; ii. 26 ff., 177 f.

[2] C.C. 1689–92, nos. 1087–8, 1862; 1693–6, no. 1738.

Jamaica saw under Beeston (1692–1701) the renewal of the strife over a permanent revenue Act, that obtained by Albemarle remaining in suspense. The Assembly, however, refused to impose fetters upon itself, and voted for short periods the additional supply required, denouncing also disallowance of Acts by one or two ignorant persons in England.[3] A threat in 1701 by the Board of Trade to confirm Albemarle's Act merely produced a demand for the accounts of the King's bounty, sent after the earthquake; when this was refused, it voted that the troops should be provided for from the bounty, and the Governor could only solve the deadlock by prorogation and the declaration of martial law, informing[4] the Board that the Assembly believed it had the powers of the Commons 'and that during their sitting all power and authority was only in their hands'.

Bermuda remained in an unsatisfactory state, for its corrupt Governors defied the laws of trade; Day imprisoned Randolph for denouncing his misdeeds and was recalled in 1700. In 1701 it was suggested that, if the Bahamas charter was forfeited,

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[1] C.C. 1689–92, no. 548; 1697–8, no. 747.

[2] C.C. 1696–7, nos. 43, 87, 126.

[3] C.C. 1696–7, nos. 40, 130.

[4] C.C. 1701, nos. 676, 749.

Bermuda and the Bahamas might be joined, but this condition failed. The Bahamas remained in complete disorganization. The Board of Trade in 1696 asserted the right to approve the Governor but were advised that there was no power to require a proprietor to give security for his Governor.[1] Haskett as Governor in 1701 begged for an armed guard to save him from the fate of being roasted alive which befell a Spanish Governor who interfered with illegal trade; he escaped this fate but was deported by an *émeute* as the reward of his effort to execute the King's laws.[2]

Yet some constitutional progress can be noted. In 1698 Bermuda at last consented to give a perpetual revenue by a tax on liquors imported, though at the same time it violated the principle of leaving control of expenditure to the Governor and Council by providing that the sums raised were to be employed for the public charges of the island and to be paid out by the Collector under the directions given by the Governor, five at least of the Council, and ten members chosen by the Assembly, who were to meet every three months to examine the accounts and dispose of the funds. In 1754 the Board of Trade admitted that the arrangement should not be disturbed, as it provided an adequate revenue.[3] Bermuda too established its ability to deal with offences by ex-Governors, for Day is alleged to have been detained there until his death, Bennett, his successor, permitting him to be prosecuted in various vexatious suits; when Day urged that he was subject only to trial in England under the Act of 1700, the judge insisted that he must be tried in Bermuda by Bermudan law.[4]

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[1] C.C. 1700, nos. 566, 597.

[2] C.C. 1701, nos. 655, 1113. Birch, his successor, on arrival declined to act; J.C.T.P. 1704–9, p. 584.

[3] A.P.C. iv. 231. Popple (vi. 311) gives the date as 1704; see A.P.C. ii. 476 (1705); on the two Acts see J.C.T.P. 1704–9, pp. 28 f.

[4] A.P.C. vi. 74. It is not clear that Day was not actually Governor when proceeded against.

PART II

THE IMPERIAL CONSTITUTION AT ITS ZENITH

VI. THE COLONIAL CONSTITUTIONS

1. *The Royal Governments*

AT the revolution the destruction of the Dominion of New England reduced the area of the territories under royal government by Connecticut and Rhode Island. There remained Virginia since 1624, New Hampshire (1679–80), and New York (1685); Jamaica (1655), Barbados (1663), the Leeward Islands (1671), and Bermuda (1684). To these were added Massachusetts by the Charter of 1691, confirming the royal control asserted in 1684–6, and New Jersey (1702). As we have seen, in 1702 the first force of the attack on the Charters of other colonies had spent itself, but the Board of Trade had not by any means abandoned hope of further success.

The Carolinas offered a suitable object of attack. In 1715 the incursions of the Yamassees found the colonists far from competent to resist, and, had other Indians lent aid, their destruction had been certain. As it was, Spain was accused of secret aid and of privateering at British expense. The colonists not unnaturally begged the Board of Trade and Parliament to secure a royal government, but the proprietors were unwilling and a bill to cancel all charters was stifled in committee. But matters were only delayed; local feeling was exasperated by the control of the province exercised by Trott as Chief Justice and Rhett as Receiver-General, in union with Shelton, the Secretary in England of the proprietors. Orders to dissolve the legislature, obtained through their influence, coincided with the mustering of the militia to meet a possible Spanish attack, and the opportunity was afforded for an armed protest which developed into a convention, by which on 28 November 1719 South Carolina was declared a royal province. The proposal suited well the Imperial government, and a *scire facias* to vacate the Charter was first ordered by the Lords Justices.[1] Later wiser councils prevailed, and negotiations were taken up with the proprietors. In the interim, on the plan followed in Maryland in 1691, Nicholson was given a commission as royal governor, in 1720, which he held until 1726, being largely plunged in grave currency difficulties during which the Assembly flooded the country with paper money. North Carolina, which had had a separate Governor since 1712, declined to accept the change of relations, but by 1729 the confusion of affairs in the province resulting from quarrels between Everard and Burrington, the ex-Governor, led to a change of view. The proprietors in 1729 by deed of surrender confirmed by Parliament surrendered both Carolinas, save that Carteret refused to give up his share and received an area on terms similar to those applicable to the Northern Neck in Virginia[1] under rather similar circumstances.[2] Burrington as royal Governor arrived in 1731.

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[1] A.P.C. ii. 778–80; vi. 122–5.

Nova Scotia had been ceded in 1713 by France, and as it contained mainly a French population no instructions as to calling an Assembly were given in the new constitution contained in Col. Philips' commission. But already in 1725 the arrival of English settlers raised a demand for an Assembly, and the Board of Trade in 1727 laid down the principle that an Assembly would be conceded as soon as circumstances would permit, and authorized settlers to be invited on this basis. In 1736 Coram suggested a scheme for a chartered province on the Georgian lines, but with a more liberal provision for self-government, but the Board in 1741 adhered to its liking for a royal province. In 1747 Shirley as an alternative suggested that a Charter on the Massachusetts line would be wise in order to harmonize the interest of the two territories. Nova Scotia was included in the Massachusetts Charter of 1691, but that had never been effectively maintained. The Imperial government, however, when Halifax was founded in 1749, gave Cornwallis power to summon an Assembly, but this authority was allowed to slumber until in 1754 J. Belcher became Chief Justice and at once raised the issue in the Council. The Law Officers advised that legislation was illegal without an Assembly, and the Board urged that any Acts passed by the Governor and Council should be indemnified after an Assembly had been called. In vain Governor Lawrence protested, adducing the early legislation of the Council for Virginia, but the Board pointed out that the power was of short duration and, since the restoration of the British constitution to its true principles, it had never been deemed wise to execute it.[1] Nova Scotia thus in 1758 obtained an effective Assembly, a boon gained by Prince Edward Island, separated from Nova Scotia in 1769,[2] in 1773. A like fate was intended to be the lot of Quebec, after the Treaty of Paris had surrendered French claims, but the royal proclamation of 7 October 1763 and Murray's commission under it, though they promised an Assembly, were not carried into effect, and in 1774 a momentous change occurred in the creation of a Crown Colony type of government by the Quebec Act.[3] Grenada, St. Vincent, Tobago, and Dominica,[4] on the other hand, were duly conceded the normal type of representative government which the Floridas, East and West, also enjoyed.

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[1] This was in the hands of the Fairfax family to 1782; the boundary was settled in 1745; A.P.C. iii. 385–91. On the rights given see Chalmers, *Opinions*, i. 153–5.

[2] A.P.C. iii. 172–7, 267–9.

The Bahamas had a curious history.[5] Proprietary rule shrank into nothing, and, as early as 1706, the Board of Trade recommended the cancellation of the Charter. In 1716 the representations of the few inhabitants left induced the resolve to resume the government, and in 1718 Woodes Rogers was commissioned as Governor to occupy the islands. The Assembly of the proprietorial rule disappeared from his commission, but he was expressly not permitted to make laws until an Assembly had been appointed. In 1722 the Governor, Council, and inhabitants begged for an Assembly which was permitted by the commission of 1728 and made actual in 1729. The Virgin Islands, which ranked as a Lieutenant-Governorship[6] under the Governor-in-chief of the Leeward Islands from 1672, obtained, by undertaking the burden of the usual 4½ per cent. duty, the honours of a full constitution with Council and Assembly despite their tiny population, so inveterate was the belief in the normal form of colonial government, whose principle of the use of a representative chamber had seemed to be stereotyped by the revolution.

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[1] Martin, *Empire and Commonwealth*, pp. 69–71; Murray and Lloyd, 29 Apr. 1755 (Chalmers, *Opinions*, i. 261). For the right of Massachusetts to the Kennebeck–St. Croix region, despite non-user and temporary loss to France (1696–1710), see Yorke and Talbot (Chalmers, i. 78–110).

[2] A.P.C. v. 80–5. Quit-rents were to yield a considerable revenue.

[3] See ch. xv for Quebec and Senegambia.

[4] A General Assembly for the islands was started but abandoned in 1768; Dominica was made a distinct government in 1770, St. Vincent in 1776. See A.P.C. iv. 754–6, 580–609, 742 f.; vi. 5–15; *Campbell* v. *Hall*, 20 St. Tr. 239.

[5] A.P.C. ii. 507–9, 698–700; iii. 194–6, 204 f.; v. 538 f.; C.C. 1712–14, pp. 333 f.; J.C.T.P. 1704–9, pp. 583 f.; 1718–22, pp. 356 f.; 1723–8, pp. 293 f., 426.

[6] There was a nominee Council, but no taxes were imposed save by agreement, cf. A.P.C. v. 519–21, 584 f.

Of quite special character were the military and naval bases of Gibraltar[1] and Minorca[2] ceded formally in 1713. As colonies by cession and of foreign race they could not claim the application of the normal methods, and these were withheld, the territories being left under strict governmental control.

Of the various colonial experiments on record few were more strange than the temporary creation as a proprietary colony of Georgia,[3] as a safeguard from Indians and a home for imprisoned debtors and other poor persons. Its constitution was completely abnormal, for it made no provision whatever for the creation of an Assembly; there was created an incorporation without limit of numbers with a Council of fifteen. The usual authority to create an executive, a judicial system, and to legislate were given with control of lands, but proposed laws must be approved by the Crown before becoming effective, so that in large measure the real legislative power for the province was the King in Council. The territory was declared a distinct province separate from South Carolina, and the proprietary form of government was to cease in twenty-one years. The Governor was to be approved by the Crown, take the oath, and give security for due carrying out of the laws of trade; the King retained the appointment of officers to collect the revenue and accounts of receipts and expenditure were to be supplied. Military command by the Governor of South Carolina was contemplated when necessary. Moreover, funds were generously voted by Parliament for the new venture. Its history was curious. Oglethorpe, its leading spirit, was anxious to save it from liquor and slaves, but both were inevitable. No Assembly was ever called to legislate; an advisory body was summoned in 1751 but was refused power to make by-laws, and therefore was only useful to petition. At the close of the appointed time[1] the experiment passed away to no one's regret, and royal government was in 1754 inaugurated on the normal American plan.

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[1] Gibraltar remained in 1720 under military rule; Chalmers, *Opinions*, i. 169–81. For the introduction by Letters Patent of English law in 1721 see *Jephson* v. *Riera* (1835), 3 Knapp 130. It was not a plantation; *Lubbock* v. *Potts*, 7 East 449. Cf. J.C.T.P. 1723–8, pp. 442–7; Clark, *Col. Law*, pp. 673 ff.

[2] Spanish law applied; see *Fabrigas* v. *Mostyn* (1773), 20 St. Tr. 81.

[3] Macdonald, *Charters*, pp. 235–48; A.P.C. iii. 299–304; iv. 123–8, 176–80.

To Newfoundland a certain measure of orderly government was given by the Act of 1699.[2] It enacted as law the code of regulations which had been in much the same form already enforced under the prerogative, and it definitely authorized the Admirals—the first captain to arrive in each harbour—to see that the rules of the Act were duly enforced, and to settle disputes between the fishing vessels and the inhabitants, with leave to any party to appeal to the commanders of his Majesty's ships sent as convoys. Thefts, murders, and other felonies committed in Newfoundland were made triable in any shire of England under the commission of oyer et terminer and gaol delivery. The Act proclaimed the free right of resort to Newfoundland for fishery and the use of the shore, while interdicting aliens from trade or fishery. The Act resulted in the convoy captains or the Admirals exercising a distinctly extended jurisdiction of a rough and ready type. There remained no form of organization for the permanent residents. A rough attempt was made in 1711 and 1712 by Captain Crowe and Sir N. Trevanion[3] to draw up at meetings between masters of ships and principal residents by-laws which are reminiscent of the procedure of the town meetings of New England, and in 1725 we find a similar movement taking place among the merchants at St. John's. These efforts naturally did not develop, but in 1729 it was decided to appoint a Governor and Commander-in-chief for the island, the choice falling regularly on the officer in command of the convoy, who therefore was not in residence save for the fishing season. He was authorized to appoint justices of the peace, and did so, but the justices were obstructed by the fishing Admirals, who resented their authority and claimed that their Parliamentary powers outweighed those of their rivals.

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[1] An offer to surrender was made in 1751; cf. Chalmers, i. 186–8. On the abortive grant to the Duke of Montagu in 1722 of St. Lucia and St. Vincent, the suggestion in 1728 to grant Tobago in lieu with effective safeguards for royal control, and the voidance of the grant in 1764, see A.P.C. vi. 196–9, 360 f.; iv. 618 f.

[2] 10 and 11 Will. III c. 25; Stock, ii. 275, 295 f., 306, 308 ff.; A.P.C. ii. 504, 553–9.

[3] Prowse, *Newfoundland*, pp. 271–3; C.C. 1711–12, pp. 129–31. In 1718 the Board of Trade advocated removal to Nova Scotia; A.P.C. vi. 108–19.

P. Yorke, on being consulted in 1730, advised that the authority of the justices was clear and was not inconsistent with that of the fishing Admirals—which he would have restricted within the bounds which were laid down in the Act of 1699; that they had no civil jurisdiction under their commission; that they could only strike a rate on inhabitants (not fishing vessels as had been done) for a prison, after presentment by a Grand Jury in accordance with their powers under English law; and that the Governor or the justices had no power to raise money for a church or other public works save in so far as justices had power under English legislation so to proceed, unless, of course, provision was made for an Assembly.[1] In 1750, after an abortive suggestion in 1737–8, it was decided by commission under the great seal to empower the setting up by the Governor of a court of oyer et terminer, and next year permission was given to execute capital sentences without waiting for royal confirmation in view of the impossibility of prolonged detention.[2] In 1741 the usual naval officer at last appeared and was made Judge in Vice-Admiralty, while a formal customs house was provided in 1764 establishing the status of Newfoundland as a normal colony subject to the Navigation Acts. Next year it was laid down by Francis Fane that Newfoundland was a settled colony to which each year the Governor brought with his commission the laws of England. In 1775 Palliser's Act, which secured a bounty for the fishery, entrusted disputes arising out of employment issues to the Vice-Admiralty Court or the Sessions, but the Vice-Admiralty jurisdiction was repealed in 1786 when the bounty was renewed. For civil justice no provisions of value remained beyond the limited authority of the Act of 1699, and the Governors exercised of themselves an authority which was challenged, when Governor Edwards returned in 1782 to England, and shown to be without legal foundation. But for a real court of superior civil jurisdiction Newfoundland had to wait until 1791.

Still less trouble was taken to provide any proper system of government for the wood-cutters of the Bay of Honduras, whose right to cut wood had been recognized by Spain in the treaty of 1670, but who had been rather unfairly neglected by the British government despite the requests of Governors of Jamaica who were nominally charged with oversight of the operations of those engaged in the industry. In 1717 the Spaniards dispersed the outlying settlements, compelling concentration at Belize, whence in 1732 the settlers were temporarily expelled by force. Their position was, however, admitted in the treaties of 1763 and 1783–6 and gradually became indisputable in point of law by the prolonged exercise of territorial rights of occupation and self-government, subject to the sovereignty of the British Crown, which was given effective recognition by the appointment of a superintendent to reside in British Honduras in 1786. Quite spontaneously the settlers had devised for themselves by 1728 an elective magistracy of five (later seven), while the public meeting exercised powers of legislation for the needs of the primitive community. Admiral Burnaby who visited the settlement in 1765 both gave formal recognition to the form of administration and approved their laws, forming them into a body of law, known as Burnaby's Code. The reasons for permitting this extremely primitive form of administration to continue were no doubt international, as the territorial sovereignty had not been conceded by treaty and to establish a formal colony would have necessitated either agreement with Spain or unilateral declaration of sovereignty which it was desired to avoid.[1]

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[1] Chalmers, *Opinions*, ii. 233–8; A.P.C. iii. 215–22, 605 f. Philips in 1719 had Placentia as well as Nova Scotia in his commission, which was now altered; iii. 231.

[2] Ryder A.G., 1749–51 (Chalmers, ii. 238–43); A.P.C. iv. 55, 117–19; 15 Geo. III, c. 31; 26 Geo. III, c. 26.

The federation of the Leeward Islands, though legally in existence throughout this period, and though in fact it revived for a session in 1798, practically ceased to exist in 1711. The particularism of the islands resulted in 1701 in an effort to modify the constitution of 1692 by requiring that for any federal Act to be binding on an island it must be passed by the whole body of its representatives, a rule which entailed disallowance. In 1705, however, despite the absence of representatives of St. Kitts an Act was passed which laid it down that local Acts might remain in full operation, but that the legislature, which was to be composed of five members elected for each island by the freeholders, and the island representatives from each Council, might bind all the islands by its legislation. But it referred to the islands several projects for common legislation, and, as it only once (in 1694) attempted to impose a tax, and even then left it to be collected and disposed of by the island Treasurers, it possessed no source of vitality; when next summoned by Parke in 1710 it quarrelled with the Governor as to the appointment of the clerk, and its final session took place next year when the Lieutenant-Governor, Hamilton, summoned it to aid him in reporting on the murder by the people of Antigua of the erratic Parke.[1] All efforts to secure common representation in London failed after the war pressure of 1690–9, and the system of quotas for mutual defence established in 1701 were never made effective. The islands were too jealous of one another, too unwilling to allow Imperial control, and too fond of financial control by their own Treasurers, to consent to surrender any powers save in time of war into the hands of a body representing the whole group.[2]

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[1] Clark, *Col. Law*, pp. 326 ff. For the Mosquito Shore and Rattan in 1743 see A.P.C. vi. 254–62; iii. 761–9.

2. *The Chartered Colonies*

The effort to convert all colonies to the one type failed throughout this period in Connecticut and Rhode Island, despite the earnest endeavours of the Board of Trade. It had not lost heart because of the failure in 1701–2, and in New York Cornbury, and in Massachusetts Dudley, kept urging action. In April 1703 it reported once more that the laws of trade could not be carried out, while the charters stood, and in 1704–6 it worked busily to secure their recall. The accusations of 10 January 1706 were as usual: repugnant legislation, denial of appeals, encouragement of deserters and pirates, refusal to present their Governors for approval, failure to recognize Admiralty jurisdiction, encouragement of woollen and other manufactures, neglect of defence and refusal of quotas called for, and disregard of the royal proclamation of 1704 by which the rates at which foreign coin should pass current in the colonies had been regulated. The bill, however, based on these charges was rejected on second reading by 50 to 34. The issue of coinage was dealt with in 1708 by an Act enforcing the rates fixed as maxima for foreign coin by the royal proclamation by fine and imprisonment, but the clause to forfeit the charters was not included. Rumours of intended action by the Tories in 1712 and 1713 led to nothing on the death of the Queen, and though, as has been mentioned, the crisis of 1715 in Carolina resulted in a bill to withdraw all the charters, that too passed over. The events of 1719, however, in Carolina and the establishment of royal government there evoked uneasiness in the colonies, and at the instance of Massachusetts its agent Dummer presented a petition against any tampering with chartered privileges. This led in 1721 to the publication of Dummer's *Defence of the New England Charters*. In this able pamphlet he contended that the chartered governments had a good and undoubted right to their charters; that they had not forfeited them by maladministration; that, even if they had, it was not to the Imperial interest to cancel them; and that the mode of procedure by bill in Parliament was unjust. 'It's true the legislative power is absolute and unaccountable, and King, Lords, and Commons may do what they please; but the question here is not about power but right. And shall not the supreme judicature of all the nation do right?' He stressed the real advantages of the colonies in building up the mercantile marine and navy and in supplying horses, provisions, and lumber essential to the sugar industry of the islands. The land granted to the colonies was in fact by them acquired for good consideration from the Indians, and its value was their creation. In defence New England had aided Jamaica in 1703 and Nevis in 1705, and done her best to conquer Canada. The mode of government with elections and juries could not be deemed unjust or oppressive. If the laws of trade were violated that was true of England, and the interference of common law courts with Admiralty courts was an English practice. He ignored indeed the narrow religious exclusiveness of the colonies, but his main contentions were never answered, and, when the Board next tried to win its way, it was merely by suggestion in 1723 to Rhode Island and Connecticut over their boundary issue. It was then put to both that they might merge in New Hampshire, but the humility of Rhode Island's reply and the firm insistence of Connecticut alike revealed their absolute determination to remain independent.[1] In 1730[2] a desperate effort was made to weaken the position of Connecticut and assimilate it to that of Massachusetts by offering a Parliamentary confirmation of its intestacy law, but Connecticut declined the bribe. As one reason for the proposed change the Board adduced the failure of the colony to submit its laws for approval. In 1740 the position of this colony was neatly described: 'This government is a sort of republic. They acknowledge the King of Great Britain for sovereign, but are not accountable to the Crown for any acts of government, legislative or administrative.'[3] It is true that in 1705 a law of Connecticut which affected the mode of worship of Quakers was repealed, by Order in Council, as contrary to liberty of conscience allowed by English law, but Connecticut never admitted a general right to disallow, and the Attorney-General in 1714 and again in 1732 admitted that it did not legally exist either in Connecticut, Rhode Island, or Maryland. A suggestion of Parliamentary action in 1734 to alter this position never went further.

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[1] For the misconduct of Douglas see C.C. 1711–12, pp. 249–51; A.P.C. ii. 687–9.

[2] C.S.S. Higham, *Eng. Hist. Rev.* xli. 190 ff. The French part of St. Kitts was ceded in 1713.

Massachusetts by reason of the Charter of 1691, though a royal government, approximated in spirit to these chartered colonies, and this explains her care to support their pretensions. The relative insignificance of the small colonies doubtless explains their immunity from forcible change; it was not until it was determined in 1764 to revise the laws of trade that it was apparent that they caused a serious gap in the system of trade control. That their existence encouraged the feeling of independence to develop in the royal colonies need not be doubted, nor that their constitutions afforded a considerable amount of suggestion for the eventual organization of the independent governments of the States of America.

3. *The Proprietary Colonies*

The proprietary colonies were equally aimed at by the efforts of the Board, but there seemed in the case of Pennsylvania little doubt that what was desired might be attained by purchase and that at no great cost. Penn unfortunately fell into monetary difficulties, which lessened his authority in the colony, and in 1703 and 1705 was ready to sell on terms. But not until 1707 was the Board prepared to consider a purchase. In 1709 the Lower Counties began to deny the right of Penn to govern and to denounce the failure to take measures for their defence, a feeling strengthened by the Quaker attitude towards the Canadian war. In 1710 the Board again seemed to favour purchase and in 1712 the sale was arranged, £12,000 being the price. Penn, however, fell ill, and the transaction never materialized, through disputes between the mortgagees of Penn's interests and his heirs. On his death in 1718 the Hanoverian indifference to activity in colonial policy triumphed, and no effort was made—as would have been easy—to secure the territorial government. It must, of course, be remembered that the right of veto of laws was secured by the Charter and other assurances for regard to the laws of trade, but even so the laxity of control is obvious. Moreover there was not even the excuse of good government, for the rule of Evans and Gookin between 1703 and 1717 was utterly inefficient and discreditable. The same spirit of *laissez-faire* was revealed, but even more strongly, in the case of Maryland when Charles Calvert, Lord Baltimore, died in 1715. The government of the province should clearly then have been retained as it had been since 1690 in royal control, but with an absolute lack of policy the request of Benedict Leonard Calvert to be restored to power as he had become a Protestant in 1713—presumably for interested reasons—was favourably received. The restored governments were those of normal young English aristocrats, Penn's distinctive character leaving little trace in his family, and they meant sufficiently well by their provinces, but the absurdity of proprietary rule was in itself obvious. Moreover, it was to prove of considerable disadvantage in practice. The conflict of interest between the people and the proprietors was obvious, and the position of their Governors was difficult in the extreme. The royal government had at least the Crown and royal commands at his back, the colonial representative of the Penns or Calverts was fighting for landed owners; if, like Sir William Keith (1717–26) and W. Denny (1756–9), he pleased the people he would dissatisfy his employers and lose his office; if he was faithful to his employers, he must neglect the interest of the people. In Pennsylvania, however, matters were better in that there was little possibility of bartering offices, owing to provisions for election; in Maryland under so good a Governor as Sharpe petty offices were regularly trafficked in by the proprietor and his friends. Far more serious was the position in war. Both in Pennsylvania and Maryland the lower houses—whose sincerity in desiring to render aid is worse than suspect—were able to conceal their unreadiness under cloak of the failure of the proprietors to consent to bearing the chief burden of new taxes necessary to meet expenses. Pennsylvania, however, was more fortunate than Maryland in that in 1704–5 it was definitely ruled that the proprietor had no veto save when in the colony; in Maryland the proprietor retained his power, which, however, he was prepared to exercise at the bidding of the Crown. The Crown for its part made common cause with the Penns, especially in the struggle during 1759–64, when the Assembly made its desire to tax the proprietary lands and the Penns' resistance a ground for playing no part in the French and Indian wars, until the Paxton Boys from the frontier massacred the peaceful Indians of Conestoga Manor and marched on Philadelphia to demand defence and redress of grievances. Constitutionally the struggle raised a most important point peculiar to Pennsylvania, for the Assembly through de Grey argued in 1760 before the Board of Trade that the power to disallow applied only to laws violating the royal sovereignty and prerogative, a possible view on a literal construction of the Charter, but one rejected by the Board.[1] The awkwardness of the limitation to six months of the right to disallow was proved in this case, for the Board approved an Act of 1759 on a formal pledge by the agents to secure amendment, which the Assembly withheld. The friction between proprietors and Assembly led to a proposal by the latter to secure royal government, and, after their forced yielding to the Governor in 1764 under stress of the Indian war, a petition was sent to London, which Franklin next year presented. It was received coldly, and the passing of the Stamp Act more than John Dickinson's arguments terminated all popular desire for change.

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[1] *Am. Hist. Ass. Rep.* 1903, i. 322–34.

[2] Winthrop's accusation and Talcott's reply, 1726, are in A.P.C. vi. 173–81, 200.

[3] So Board of Trade and Council, 16 Feb. 1760; A.P.C. iv. 445 f.

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[1] *Pa. Statutes at Large*, v. 691–7; A.P.C. iv. 440–2. The idea of partial disallowance suggested by the Board was idle. In 1751 the Board took a narrow view; A.P.C. iv. 117.

Historically, the utter failure of Pennsylvania and Maryland, on the plea of disagreement with the proprietors, to make provision for defence was largely the cause of the need for Imperial protection which led to Imperial taxation and American revolt, and this fact was in part at least due to the failure in this period to secure the extinction of proprietary rule and land ownership.

4. *The Colonial Companies*

During this period, which saw the development of the East India Company to territorial sovereignty, colonial companies played a part of limited importance. The Hudson's Bay Company was content to devote itself to the fur trade, neither seeking nor encouraging settlement, while the Royal African Company made no effort to found a territorial sovereignty, a fact which explains why Senegambia, acquired from France in 1763, was established after a brief period of Company control on the basis of a royal colony, though on a new model.[1]

5. *Colonial Constitutional Law*

Despite the intrusion of Parliament into many spheres colonial constitutions rested still in the main on the prerogative, and it was only at the close of this period that Parliament by its Acts of 1765 and 1774 provided for the government of Senegambia and Quebec respectively. On the other hand, the laws of trade definitely imposed serious responsibilities on colonial Governors and determined the attitude to be adopted in trade matters. One set of instructions to the Governors was prepared with the aid of the Commissioners of Customs under the powers provided in these Acts, and were issued separately to the officers concerned.

The prerogative instruments establishing constitutions were normally the commission and instructions to the Governors of the royal colonies. In the case of Massachusetts, however, the system of government was definitely laid down in the Charter of 1691, while the chartered colonies had their charters of 1662 and 1663 respectively, and Maryland and Pennsylvania had their charters of 1632 and 1681. Pennsylvania had also the

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[1] See ch. xv, § 2. For commissions to try pirates on the coast see A.P.C. iii. 2–9. For the attack on the legality of the monopoly which was hardly negatived by the Company see J.C.T.P. 1723–8, pp. 230–44, 247–53, 257–63, 267–70.

Frame of Government as modified from time to time and finally set out in 1701. The commission was renewed on each occasion of the appointment of a Governor—a practice which disappeared only in the period 1870–80, and in appearance, therefore, there seemed on each occasion to be a re-creation of the system of government. But there was no possibility of departure from the fundamental basis of the constitution, as Thomas Pownall pointed out;[1] government by Governor, Council, and Assembly, once conceded, could not be withdrawn by the King in Council, and therefore all that could be varied were minor details, such for instance as the constitution of the Council, and the extent of authority of the Governor and the conditions on which he was to exercise it. The prerogative was the King's to bestow, and he could grant it or withhold it in such degree as he thought fit, but he could not extend it. What really is remarkable is the fact of the stability of the commissions, a fact due doubtless to the natural tendency of legal officers to follow the established form. The instructions tended to grow longer and longer, for, with the development of the complexity of government, and the desire of the central authorities to superintend the actions of Governors, the normal method was to expand the rules laid down very freely. In addition, however, to the standing instructions special instructions were constantly given, either by the King in Council, or by a Secretary of State, or by the Board of Trade. The instructions did not depend for their weight on the mode of communication; they were all valid to bind the Governor as regards his duty to the King.[2]

Between commission and instructions there were vital differences. The former was essentially a public document, issued under the great seal, read and recorded in the Council books. The instructions under the royal sign manual, though equally approved by the King in Council, were secret, but the Governor was required to communicate certain parts to the Council. Difficulties naturally arose as to the legal effect of discrepancies between the two; thus the instructions required a quorum of five against three in the commission; gave power to appoint judicial officers only with the assent of the Council, while the commission was silent on this limitation; limited the general power of the commission to assent to laws by excluding certain classes of measures; and forbade action on the power to create new courts save with royal assent. The sound view clearly was that the commission must be supreme in law, and that violation of instructions was ground for reprimanding or removing a Governor, but not for invalidity in what he did. It was, however, ruled by Yorke A.G.[1] after nine months' hesitation, and evidently against the Solicitor-General's view, that Hardy's action in New Jersey in appointing judges during good behaviour in face of the instructions to appoint during pleasure, was legally invalid on the score that the instructions being referred to in the commission must be deemed to be incorporated. But he admitted—illogically—that the acts of the judges were valid and that only the King in Council could remove them. The issue arose especially as regards the validity of Acts assented to in defiance of instructions,[2] a matter finally laid to rest by the Colonial Laws Validity Act, 1865, declaring (s. 4) that assent was not vitiated by disobedience to instructions not actually embodied in an Act. Though disputed, it will be seen that, while Acts were often disallowed on this score, in no case were they held in this period legally invalid on this score by the courts.

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[1] *Adm. of the Colonies*, p. 54. Cf. Connecticut's parallel of Charter and Commission, 1723; *Am. Hist. Ass. Rep.* 1903, i. 329.

[2] Granville's view of the instructions as law (1757: Bigelow, *Franklin*, i. 366), as 'the King is the legislative of the colonies', was clearly invalid, despite Sawyer A.G., 16 Nov. 1681 (Chalmers, ii. 287).

The commission contemplated that the Governor should act not merely under the prerogative powers, executive, legislative, and judicial, conferred by it, but also according to such reasonable laws and statutes as might be enacted by the legislature. The relation between the prerogative powers of the Governor under the commission and legislation was normally similar to that in the United Kingdom: the former might be limited indefinitely by statute duly assented to;[3] thus the right of appointment might be taken away from the Governor or subjected to conditions; the control of military forces restricted or annihilated, and his financial powers reduced to nothing, while the legislature might determine its own existence and define its membership and franchise. Such measures might be refused assent or disallowed, but they were not invalid *per se*. Such statutes came to form a most important body of constitutional law; the Colonial Laws Validity Act, 1865 merely records standing doctrine when it by s. 5 asserts the inherent right of a representative legislature to change its constitution.

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[1] N.J. Arch. ix. 380 f. Contrast Pratt A.G., *Pa. Statutes at Large*, vi. 570 f., on the same issue in Pennsylvania.

[2] Massachusetts absolutely denied the right to give instructions (Pownall, *Adm. of Cols.*, pp. 73 f.), as did Pennsylvania (*Statutes*, iv. 350–2).

[3] e.g. the Chancery Act of Antigua, A.P.C. iii. 322–5 (1731).

The exercise of prerogative rights was also moulded by local customary usage, so that divergence between English and colonial practice depended not merely on restrictive legislation in either country, but also on usage which Governors could not safely ignore.

In matters of Admiralty the Governor and the judges received their commissions and instructions from the Board of Admiralty; these rested partly on prerogative, partly on statute. Disallowance had frequently to be invoked to safeguard these powers.

6. *The Common and Statute Law of the Colonies*

This period saw the development in the colonies of the doctrine of English common law as the basis of colonial law.[1] This view was far from accepted in the New England settlements of the seventeenth century, which, as has been seen, treated as the primary and fundamental law the law of God, while positive law-making was carried out consciously by the legislatures, and less avowedly by the discretion of the magistrates, whose action in Massachusetts had far-reaching effects, but whose modes of procedure, though criticized in Connecticut and other colonies, was largely followed in practice in these jurisdictions. Massachusetts legislation also displayed a marked independence and readiness to adapt itself to new circumstances, though naturally in such parts of the legal fabric as contracts and deeds English forms tended to be used. The more intensive introduction of the common law must be traced to the permanent judicial tenure normal under the new Charter, following on the régime of Andros with its conscious effort to apply English law. Popular election made judges in Connecticut and Rhode Island incapable of conscious use of the common law, and in New Hampshire the Assembly in 1679–80 simplified the task of judges by evolving a code based on English statutes as well as common law, and excluding any application of laws not enacted by the Assembly; as late as 1782 the Chief Justice declined to follow precedents. In New York, on the other hand, the Duke's laws of 1665 exhibit much of English law, and it steadily developed power until in 1761 it was declared to be the admitted foundation of the colonial law together with statutes enacted before the colony had a legislature. In the New Jerseys scripture dominated early law, but East Jersey in 1698 gave its people the privileges of the English common law. Pennsylvania was marked by skilled adaptation by statute of English law and equity, which from the first were administered together in the courts. In Maryland the principles of the common law were accepted from 1662, and reaffirmed as at the basis of Virginian law in 1661–2, while North Carolina in 1715 adopted the common law 'so far as shall be compatible with our way of living and trade', and South Carolina adopted it in 1712, together with a select list of statutes, excluding those on military tenures and ecclesiastical matters, but including those declaring the rights and liberties of the subjects.

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[1] P. S. Reinsch, *English Common Law in the Early Am. Col.* (1899). The commissions gave English law to the West Indies.

The English theory of the general law of the colonies so far as they had been settled was simple. It is admirably summed up by Richard West on 20 June 1720:[1] 'The common law of England is the common law of the plantations, and all statutes in affirmance of the common law passed in England antecedent to the settlement of any colony are in force in that colony, unless there is some private act to the contrary; though no statutes made since those settlements are there in force, unless the colonies are particularly mentioned'. With this may be compared the view of Yorke and Wearg of 18 May 1724[2] when asked to advise on the situation in Jamaica which would arise on 1 October 1724 on the expiry of the statutes then in being: 'Such acts of Parliament as have been made in England to bind the plantations in general, and Jamaica in particular, and also such parts of the common or statute law of England as have by long usage and general acquiescence been received and acted under there, though without any particular law of the country for that purpose, will . . continue'. This statement, though made in respect of a colony originally conquered, is based on the fact that English law was promised by Charles II, and introduced by proclamation on the settling of the island. It leaves one ambiguity, whether it means that Acts of Parliament passed after the settlement could be made part of the law of the colony by acquiescence, but this sense is probably not to be read into the declaration.[1] Rather it means that usage is evidence whether a part of the common or statute law, as it existed at settlement, is such that it can be adapted to Jamaican conditions and therefore attain force there. It was clear doctrine that, while the common and statute law were introduced on settlement, or by grant of English law, it was merely in so far as they could be made applicable to the local conditions. The matter was squarely raised in *R.* v. *Vaughan*[2] when the issue was whether Acts as to the sale of offices were applicable to Jamaica, and Mansfield C.J. ruled that these acts, though passed long before the settlement of Jamaica, were not in force there, as they were mere regulations of police not adapted to the circumstances of a new colony and therefore no part of that English law which was supposed from necessity to be carried by settlers into every new settlement. No Act of Parliament made after a colony was planted was construed to extend to it, unless the intention of the legislature that it should so extend was made clear in the Act itself. This doctrine has often since been repeated and applied in new colonies such as Australia.[3]

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[1] Chalmers, *Opinions*, ii. 202. Cf. Henley and Yorke, 18 May 1757 (ibid., i. 198).

[2] Ibid., i. 220.

In fact it would have been far from advantageous, and indeed absolutely impossible, to introduce the whole fabric even of the common law into the colonies. That would have required trained lawyers, and the prejudice against lawyers in the colonies was such that in places as different as Virginia, Massachusetts, and Jamaica they were at times absolutely excluded from practice, and Locke in his Carolina constitution denounced pleading for hire as base. But, when the colonists demanded the application of English law, they were thinking of that law as regulating the relations between Crown and subject and protecting the latter, not normally of the law as to subjects *inter se*. American opinion fastened on such ideas as the right to have a jury both in civil and criminal cases; the right to freedom from arbitrary imprisonment, and its enforcement by the writ of

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[1] That usage could create law is held by P. Yorke, 9 Mar. 1729 (ibid., i. 197); cf. 25 Geo. II, c. 6, s. 10.

[2] (1769) 4 Burr. 2494. Cf. *Blankard* v. *Galdy* (1693), 2 Salk. 411.

[3] *Cooper* v. *Stuart* (1889), 14 App. Cas. 286. For a straining of law against a printer see *Bradford's* case (Pennsylvania); Channing, *Hist.* ii. 480.

Habeas Corpus; and the right of a subject not to be deprived of his property, save as the result of a regular process of law. These rules could be found in the common law, but the advantages of the Habeas Corpus Act were naturally desired, and it was held that the principles of the Bill of Rights and the Act of Settlement ought to be made effective in the colonies.[1] On the other hand, the Imperial government was strongly opposed to the introduction of the whole of the English law from time to time into the colonies. The main ground was doubtless anxiety lest thus the power of the Crown in the colonies should be diminished. The prerogative was carried as it stood when the colonies received first English law, and was not diminished by statutes which did not mention the colonies. To introduce these statutes and give the privilege of the statutory Habeas Corpus protection would be dangerous; as was repeatedly pointed out in thwarting the desire of Jamaica to enact as law the body of English law, this would affect the prerogative, and deny the right to keep a military force in time of peace without special local legislation.[2] The same view was applied to other attempts as in Antigua[3] to introduce English law *en masse*. A subsidiary motive was doubtless the absolute folly of making statutory the whole of English law with its technicalities which the colonies could not even attempt to operate. The combination of the motives is seen absolutely in the case of Maryland, where a struggle,[4] begun in 1696, raged between 1722 and 1732 regarding the application of the laws of England. Daniel Dulany and his friends, the majority in the Assembly, maintained that Maryland was a settled colony and that all English laws, including statutes, applied automatically unless there were in the latter words of local limitation to England. The proprietor pointed out that the Habeas Corpus Act had been repeatedly ruled not to apply to the colonies, and that there were Acts which would be most inconvenient for the colonies to have, such as the statute of 5 Eliz., c. 4, regarding servants and the statutes of fraud and usury. In the end the issue was settled sensibly by the judges being required to take an oath which included as binding on them reasonable laws and customs of England which were agreeable to the constitution of the province.

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[1] See p. 141 *ante*; A. H. Carpenter, *Am. Hist. Rev.* viii. 18 ff. (Habeas Corpus).

[2] See p. 12, *ante*.

[3] C.C. 1706–8, no. 164.

[4] Osgood, iii. 27 ff.

The insoluble difficulty of deciding what statutes passed before the settlement of a colony applied to it or not is illustrated by the exactly contrary views taken by English officers on identical issues. In 1676 the Admiralty Court[1] of Jamaica held that its jurisdiction was restricted under the principles of the English Acts defining and lessening the jurisdiction of the English Admiralty, 13 & 15 Rich. II, cc. 5 and 3, and 2 Hen. IV, c. 11. So in 1720 in the opinion above cited[2] R. West adopted precisely a similar view; these statutes enacted before the settlement of a colony applied to Pennsylvania and were effective there, if not barred by local legislation, and it was therefore quite legal for courts of common law to issue writs of prohibition to the Admiralty Courts in the colonies. Yet, on the other hand, when the view of the Jamaican Court in 1676 was reported to England, Dr. Lloyd and the Attorney-General[3] reported that the statutes were not law in Jamaica, being made for England, unless the King declared them so. It is not surprising that the colonies found the difficulty of deciding what statutes or common law applied nearly insoluble, or that in Pennsylvania in 1715–18, and in Connecticut in 1730, it was still possible to argue stoutly that the common law or statutes had no application unless and until made part of the local law by local enactment. The New England tradition that the law of God was the foundation of law and not English law doubtless helped to counter the idea that English law was the common law of the colonies, while, on the other hand, to English lawyers it seemed inevitable that English law should be in operation wherever there was no other law in a settled colony.

There were thus in the view of English lawyers two definite kinds of English law in force in any settled or conquered colony: (1) English common law and statutes passed before the settlement (in a conquered colony before the introduction of English law), so far as the latter were of general application and not limited to English conditions (this, in effect, is what was meant by statutes in affirmation of the common law), and (2) Acts expressly extending to the colonies, whether passed before or after settlement.

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[1] C.C. 1675–6, no. 863.

[2] Chalmers, *Opinions*, ii. 209.

[3] C.C. 1675–6, nos. 957–8, 972, 976. For the application of 12 Anne stat. 2, c. 18; 4 Geo. I, c. 12, on preservation of vessels forced on shore, see Chalmers, i. 200–2 (1767); A.P.C. v. 111.

VII. THE EXECUTIVE IN THE COLONIES

1. *The Governor*

THE Governor[1] in a royal colony was appointed by order of the King in Council approving the draft of his commission on the recommendation of the Secretary of State, or from 1752–61 of the Board of Trade. The motives prompting his selection were as varied then as now; services to a government, personal friendship, desire to remove an inconvenient person from the country, competed with the more honourable desire to promote the public interest. There was no bar on local candidates; four of ten Governors of Massachusetts were local men, and both the royal Governors of New Hampshire had this claim. Elsewhere it was rarer. There were able Governors enough, having regard to all the circumstances and the low standard of public service of the day: Spotswood of Virginia, Shirley, Bernard, and Hutchinson of Massachusetts, Sharpe of Maryland, Morris of New Jersey, a local nominee, and Burnet of New York and Massachusetts all deserve recognition, as well as many minor but honest and hard-working men. Of those who were worthless Anne's relative Cornbury of New York takes first place; his dishonesty permanently biased the tendency of colonial politics to deprive the Crown of power in finance. In the proprietary provinces the proprietor appointed, but subject to royal approval, which could not be enforced in the case of the elected Governors of the chartered colonies.

Tenure of office was strictly at pleasure. Patents expired under common law at the death of the king, but officers were continued in office for six months by Imperial Acts.[2] Government was carried on under the old commission until the publication of his successor's commission.[3] Actual tenure depended on many considerations: the distance from home doubtless allowed many Governors to continue in office when recall would have been a meet fate, but, on the other hand, complaints brought home against them might poison the ear of the Board of Trade or Secretary of State and lead to undeserved dismissal or reproof. Among proprietary Governors Keith illustrates well the temptation to cultivate good relations with the Assembly at the expense of his employers, who had to dismiss him summarily in 1726.

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[1] Styled Captain-General and Governor-in-Chief (in Virginia, Lieutenant and Governor General).

[2] 7 and 8 Will. III, c. 27; 1 Anne, c. 2; Chalmers, *Opinions*, i. 227, 307.

[3] On Lowther's recall see C.C. 1712–14, pp. 335–7.

The Governor's salary[1] was secured independently of the legislature's pleasure only in a few cases, Virginia, Maryland, in Georgia and Nova Scotia, where the Imperial government provided funds, in North Carolina, where the quit-rents were used, and the West Indies, where royal revenues usually were available. Elsewhere his dependence was a constant source of pressure on him to neglect his obligations to the Crown. It varied from £8,000 in Barbados, £2,000 in Virginia, and sometimes New York, to £600 initially in Georgia, but its value depended at times on the state of the currency. It was supplemented by fees, which were in accordance with English custom charged for many official acts where they were of value to the individual, such as on grants of administration, marriage licences, certificates of vessels, bills of health, oversea passes, licences for taverns, grants of naturalization, licences to purchase lands from Indians, licences to practice as attorney, writs of error, land grants, and other chancery business, and miscellaneous other functions. The Assemblies attempted, with varying success, to determine these as other official fees by law, on the score that they were unduly high; New Jersey regulated them in 1731, New Hampshire in 1748, and many were regulated by special provisions in Acts authorizing services as in Maryland. He was entitled also under the Acts of trade to a third of forfeitures under these measures, in order to encourage him to activity in securing their execution, and colonial Acts often gave him a similar share in forfeitures for breaches of customs laws, of quarantine regulations, practice of law without a licence, and miscellaneous other misdemeanours. More valuable were the presents which were given to recoup expenditure on taking up office, or as in Pownall's case in 1760 on leaving the province; other grants for special services were not rare, for Shirley thus received some recognition of his efforts in regard to the capture of Louisburg and the large grants made by Parliament to Massachusetts, but they were more often intended, despite royal instructions not to accept presents, to induce Governors to disobey the King. Burnet declined £3,000 on this score, preferring to adhere to his duty of demanding a permanent if small salary for the Governor. A residence was sometimes provided as in Jamaica, Virginia, Maryland, the Carolinas, and New York. The total emoluments varied, and are uncertain; Virginia must have been worth £2,500, Massachusetts £1,330, while New Jersey was put at £800–£1,000, with £1,600 for New York when the diminution of land grants lessened fees from that source. The West Indian Governors, on the whole, fared a good deal better, as the King was in a position to provide from funds under royal control such as the 4½ per cent. duties in Barbados and the Leewards, and the legislatures gave freely.

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[1] For rates in 1703 see A.P.C. ii. 428–32. In 1765 £250 from land revenue was given in Bermuda; A.P.C. iv. 670.

Immediately on reaching his government the Governor on assuming office was required to take before the Council the oath for the faithful performance of his trust as Governor and for the due administration of justice; oaths of allegiance and supremacy and of abjuration,[1] and the denial of transubstantiation as provided in 25 Chas. II, c. 2, s. 8; and the oath under the Navigation Act of 1696[2] to carry out the Acts of trade. He was likewise called upon to administer similar oaths (save as regards trade) to his Councillors.

Normally each government had a distinct Governor. The effort of William III to undo the harm resulting from the destruction of the Dominion of New England by uniting colonies under one government resulted unsatisfactorily and was abandoned after Bellomont. But it left the unsatisfactory practice of having one Governor for New York and New Jersey, and one for Massachusetts and New Hampshire. The result was that in both cases the weaker colony's interests were completely neglected, and Belcher intrigued to settle the boundary dispute between his two governments in favour of his native Massachusetts. On his removal in 1741 the union of the two governments ceased. It had been ended on the request of New Jersey in 1738 when Lewis Morris was given the Governorship, and New York ceased to influence it. Under proprietary rule cases of one Governor for the two Carolinas occurred, but from 1712 separation was normal and this continued under royal control. Pennsylvania and Delaware had originally been united; when in 1702 the two legislatures were made distinct, the executive still remained one. In the West Indies the Leeward Islands had been grouped from the first, and this remained when they were severed from Barbados in 1671. The Windward Islands, at first united, were later dissociated.

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[1] 1 Geo. I, c. 13; 6 Geo. III, c. 53.

[2] 12 Chas. II, c. 18, s. 2; 15 Chas. II, c. 7, s. 8; 7 and 8 Will. III, c. 22, s. 4; 8 and 9 Will. III, c. 20, s. 69; 4 Geo. III, c. 15, s. 39; terms in A.P.C. iii. 622 (1710). Proprietary Governors had to give security for due performance of their duties as demanded by the Lords, 18 Mar. 1697; Stock, ii. 206; C.C. 1696–7, p. 409.

In the event of the Governor desiring to be absent from the colony the royal assent was necessary. In that event or of death his authority devolved on the Lieutenant-Governor or Commander-in-Chief or other person designated to succeed by the Crown; failing any such person, the Council primarily administered.[1] But in 1707 Anne ordered that the senior Councillor should act,[2] though this rule was not observed everywhere until George III's reign. In Massachusetts and Pennsylvania the Council maintained successfully the right to administer, the right in the former case following from the Charter, while in the latter it was based on usage. When the Council or its senior member acted, it was subject to strict subordination in certain vital matters;[3] none save essential Acts were to be passed; the Assembly was not to be dissolved; councillors and officers were not to be removed without the assent of seven Councillors, unless special instructions were given. Any such action must be reported forthwith. In Pennsylvania it was a moot question what power the Council had, when it administered, to deal with legislation, in view of its normal exclusion from that sphere, and the negative prevailed.

The Lieutenant-Governor held a royal commission empowering him to act in event of the death or absence of the Governor, subject to instructions from the Crown and to any directions by the Governor. His position, otherwise, was of no special importance, unless he was a member of the Council when he normally acted as its President when it was in legislative session, and the Governor under the later practice was absent. When the Governor was away in one of his governments, *prima facie* the Lieutenant-Governor in the other should have exercised full authority, but Cornbury insisted on denying any important functions to the Lieutenant-Governor in New Jersey,[1] and Shute and Belcher treated in the same method the Lieutenant-Governors in New Hampshire, and were upheld by the Board of Trade.[2] In Virginia the Governor was for a prolonged period an absentee, Orkney, Albemarle, and Loudon successively holding the office until in 1768 the place was required for Botetourt, a ruined courtier. The Lieutenant-Governor shared the emoluments, and in 1739 Gooch laid down very firmly to Albemarle that he must be permitted to exercise unfettered his patronage which was essential for managing the province.[3] In Pennsylvania the proprietor was Governor-in-Chief, and the resident Governor was strictly deputy or Lieutenant-Governor, the style given to the representatives of Baltimore in Maryland.

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[1] As in New York in 1701; C.C. 1701, pp. 194 ff. Cf. Jamaica, 1690; C.C. 1689–92, nos. 758, 873.

[2] C.C. 1707, no. 874, ii; Chalmers, *Intr.* i. 410. In the Leewards the senior Lieutenant-Governor was to act; A.P.C. iii. 321 f. (1731). To prevent an infirm Councillor acting, a Commander-in-Chief might be specially nominated (J.C.T.P. 1723–8, p. 282) or be removed as in Virginia in 1727; A.P.C. iii. 838.

[3] Suggested by the Tranquillity Act, 1720, of Barbados passed because of abuse of authority by Presidents; J.C.T.P. 1718–22, p. 251.

2. *The Council*

The Council formed an essential part of the executive machinery. While the idea of government by Council was early abandoned in favour of the superior efficiency of one-man rule, the advantage of a Council as a check upon and aid to the Governor was never forgotten. The Stuart plan of controlling the Governor by naming the Councillors in the Governor's commission was adhered to, and the rule remained that all members owed their final appointment to the Crown, the formal recommendation resting with the Board of Trade. The normal number was twelve; to fill vacancies at first the rule was to require the Governor to keep before the Board a list of six (later twelve) names; still later, from 1753, he was required to present three names of persons suitable to fill a vacancy which he notified. Provisional power to appoint was accorded when the number in the colony fell below seven (or nine), but the decision rested with the Crown. Members were to be loyal, of good estate and life, and inhabitants.[1] In New Jersey it was normal to secure representation for both parts of the province, but this was not legally binding. It was always, however, resented if one element in a province alone were represented on the Council. The Governor's recommendations were normally honoured, but we find cases where Bladen, Bridger, Fane, and Halifax himself had protégés. Sharpe in Maryland found that the proprietor preferred to appoint his connexions to the Council in lieu of better men, and in 1749–51 Belcher's suggestions for New Jersey brought down on him the wrath of the Board. It was, however, clear that, if a Governor could not be trusted in this matter, he was hardly likely to prove satisfactory.

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[1] N.J. Arch. iii. 109–11.

[2] Osgood, iii. 210, 219 f. Shute in 1717 ruled that the Assembly had not legally been dissolved by Vaughan.

[3] Osgood, iv. 105 f.

Seats were forfeited by one year's absence without the Governor's leave, or two years without that of the Crown. Removal was originally left to the Governor in so far as he might suspend, reporting at once to the Board for decision. Later he must normally obtain the assent of his Council, but, if that were undesirable in view of the nature of the reasons for action, he could suspend but must report. The decision of the Crown normally was in accord with the wishes of the Governor, who thus exercised a considerable measure of control over his Council. But in 1706 Cornbury was ordered peremptorily to replace Lewis Morris, and in 1719 Spotswood had to reinstate W. Byrd, and similar action occurred later, thus checking arbitrary power.[2]

In Massachusetts the Council was elective under the Charter, the number being 28, 18 from Massachusetts, 4 Plymouth, 3 Maine, and 1 from the Sagadahoc region, with two unallocated. The election was annual by the Council and Representatives by joint ballot, subject to the veto of the Governor, as was established in 1692 against the illegal claim of the House to elect. The veto was used from time to time as by Dudley in 1703–4 to keep out his personal enemies, while in 1741, during the land bank crisis, Belcher refused to accept thirteen members, whereupon the Council was left incomplete, the House refusing to fill vacancies. In the main, Councillors were freely re-elected, even when they had resisted the House; thus in 1729 in the salary issue with Burnet only four Councillors lost their seats, though the Council had offended the House. All this changed in 1766, when a clean sweep was made of the Lieutenant-Governor and the other official members. In size and elective character the Council was unique.

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[1] Roman Catholics were appointed in Grenada in 1770; A.P.C. v. 565. W. de Grey, 1768, showed (v. 6 f.) that English penal acts did not bind the colonies.

[2] A.P.C. ii. 569 f., 574–82, 762 f. (Crowe, Barbados, 1709–11); iv. 370 f. (Moore, Jamaica, 1757–8).

In Pennsylvania Penn in 1701 appointed a Council of State of ten persons, authorizing the Governor to fill emergent vacancies, and to increase the number if need be. In usage the Council seems to have been consulted as to additions, while removal lay with the Governor and Council, though in emergency the Governor might act.

To the Councils were added at first individually, from 1733 by regular order, the Surveyors-General of Customs, and later the Superintendents of Indian Affairs.[1] Lieutenant-Governors sometimes were placed on the Council. It was intended in Massachusetts to arrange this, and in fact from 1691 to 1732 the Lieutenant-Governor so sat, voting, however, only when elected; in that year Belcher forbade the practice, apparently on personal grounds.

Councillors as such were normally only paid daily allowances during the sessions of the Assembly, when they acted as legislators; in Virginia, however, they had pay from the permanent revenue, and so in Maryland, until the Governor engrossed it all, and the lower house in 1723 refused to vote allowances.

The Council had executive, legislative, and judicial functions. As an executive body its meetings were summoned by the Governor, who presided in it and proposed matters for debate, but was ordered to allow freedom of speech and vote. In Pennsylvania, where things were ordered in detail, the Council met weekly; elsewhere much depended on the Governor and the state of business. The quorum under the commission was three, under the instructions five, while in Massachusetts it was seven.

There were no matters on which the Governor could not, as far as executive business was concerned, consult the Council. In his instructions and even commission there were always included clauses of this nature, such as those requiring that he should act with the Council in the issue of warrants for expenditure; in erecting fortifications and in proclaiming and exercising martial law; and in doing anything for which no definite provision was made in his commission. He had also to consult the Council regarding calling Assemblies and establishing courts and regulating their jurisdiction. In the case of the appointment of judges and justices of the peace, the Governor of New York was required in 1709 to act with the consent of the Council, but this rule, though regularly laid down thereafter, had to be supplemented by a specific order that the consent of at least three members of the Council must be secured.[1] While Governors were evidently fond of ignoring the Council when it came to a matter of patronage, they were not unwilling to seek to evade responsibility by reliance on it, even in matters out of its sphere. The Massachusetts Council gave a non-committal reply to an interrogation as to the Governor's power as to martial law, but it advised Shute in 1719 that he should not assent to a bill imposing duties on English goods. Sharpe of Maryland similarly asked his council if he could assent to a tax on the proprietary estates, while Fauquier of Virginia sought thus to excuse his improper conduct in assenting to the Act of 1758 lessening ministers' salaries, on the score that the Council had approved his action, an excuse severely censured by the Board.[2] Consultation on bills was anomalous, seeing that in normal colonies the bill must have first passed the Council as a legislative body. In Pennsylvania, on the other hand, the Council had no recognized legislative function, and the lower house in 1709 objected vehemently to Gookin's asking its advice on a supply bill. Under Keith the issue came to a violent dispute. He set himself to win popular support and to ignore the Council as an agent of the proprietors; he was instructed, therefore, to consult the Council on every meeting of the lower house, to return no bill without advice, and to assent to none without consent. In reply, he denied that the Council had any legislative power, and insisted that it was merely to advise and witness the Governor's actions.[3] He was dismissed and the Council was normally used to advise, but in 1759 the Governor assented to a bill for paper money in defiance of its advice in return for the Assembly's favour.

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[1] A.P.C. iii. 382–4; v. 228 (1770). They were not to administer unless appointed ordinary members.

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[1] Cf. A.P.C. iv. 184, 187, 208 (1753).

[2] A.P.C. iv. 420 f. Dobbs adduced the advice of Chief Justice and Attorney-General as excuse for assenting to judiciary acts, A.P.C. vi. 621 f., but was severely condemned.

[3] Osgood, ii. 545 ff.

The measure of control in fact exerted by the Council over the Governor depended on character and circumstances rather than formal law. In theory the Governor could control Councillors, but those who insist on this are Hutchinson and Dummer, who had no practical experience with nominated Councils. In Virginia the Council was strong, and secured the removal of Nicholson and intrigued against Spotswood. In 1715 Hunter complained of the New Jersey Council's resistance to measures, and in 1749 both houses had separate agents in London. In Maryland the Council was the centre of resistance to attacks on the proprietor's interests, as in Pennsylvania. In Massachusetts, though elective, the Council showed many signs of Conservatism, due in large measure to the practice of electing the Secretary, Judges, and Attorney-General, as well as the Lieutenant-Governor, to seats and thus securing a strong official contingent, which only disappeared in the constitutional struggles in 1766.

3. *The Officers of the Government*

Administration was carried out by varied officers whose relations to the Governor were of different character. The judicial and administrative posts in general might be filled by appointees of the Governor, but in many cases, as will be seen, work which would normally be carried out in this way was entrusted by the Assemblies to commissioners, who acted without subordination to the Governor, thus impairing the efficiency of the government. As against these officers who were essentially local in appointment and in responsibility, there were officers who owed their appointment to the King, and who, though essentially part and parcel of the local government, yet were not under the complete control of the Governor, as shown by the fact that he had power to suspend but not to remove officers holding by royal patent.[1] Such officers might include the Chief Justice, Attorney-General, Secretary, Provost Marshal General, Surveyor General, and Receiver-General, but there was no fixed principle governing these matters. The naval officer in many cases also was a royal appointee.[1]

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[1] Patents might be under the Great Seal of the Realm, or the Colonial Seal, authorized by warrant. Cf. C.C. 1712–14, p. 245. For the offices so dealt with see Basye, *The Board of Trade*, pp. 230–2 (*c.* 1760).

Other officers were less intimately connected with the colonial government and remained under Imperial control. The deputy Auditor was appointed by the Auditor-General in England, who was under the control of the Treasury. The Surveyor-General of Woods was again an officer with functions wider than any one colony, though his operations were mainly in New England, and his responsibility was to the Imperial government direct. The Surveyors of Customs and the other officials were subordinates of the Commissioners of Customs in England, and the officers of the royal naval and military forces were subordinate to the Imperial government even when they were engaged in operations in the colonies. The Vice-Admiralty Courts of the colonies were established under commissions issued to the Governors from the Lords of the Admiralty, and the selection of judges was controlled ultimately by the Admiralty. The Postmaster-General had subordinates, and Franklin was Deputy up to 1774, and the Bishop of London had commissaries up to about 1750 and still later in Virginia.

There was, therefore, a distinct lack of coherence and order in administration, and the inter-departmental feuds which are marked even in governments where there is ultimate unity of control were far more in evidence among officers who owed different allegiances. This defect was increased by the practice that arose for officers in England to be permitted to execute their offices by deputies, who were seldom generously remunerated, and who might easily hold other offices, for plurality of badly paid posts was perfectly common, and the duties of such posts might not be consistent.

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[1] Montague S.G., 1708, advised that the Governor had the right to appoint by law, but would obey the Crown; Chalmers, i. 166–9. They were appointed by sign manual regularly later. Patent officers in 1760 included in Jamaica Secretary, Provost Marshal, Receiver-General, Register in Chancery, Clerk of Courts, Clerk of Markets, Naval Officer; sign manual, Lieutenant-Governor and Attorney-General. For conflict as to patent rights see, e.g., Skene's case, Barbados, 1712–15; J.C.T.P. 1709–15, pp. 389 ff., 602; Jones, Bermuda, 1704–9, pp. 375 ff.; Lawrence, Maryland, 1709–15, pp. 130 ff.

VIII. THE POWERS OF THE EXECUTIVE

1. *The Governor and the Imperial Government*

THE Governor as the chief of the officers of the Crown in the colony was entrusted with duties of supervision in some measure over the performance of duty by other appointees of the Imperial government. Thus in case of misconduct he was allowed to suspend patent officers owing appointment to the King, and to appoint officers to act in their place, a power also to be exercised in the event of death, the interim holder receiving half salary. He was also expected to report on the conduct and capacity of patent officers or the deputies, by whom too often they performed their functions. Over naval forces detailed for customs preventive duties he was at times[1] given direct control, and local garrisons might be placed under his charge, but only by special authority could he command other royal troops sent to the colonies. To naval and military forces not under his control he owed the fullest duty of support and co-operation.

In addition to his general obligation to support the officers of customs he was required to perform certain specific duties under the Navigation Acts of 1660, 1673, and 1696; an oath was imposed on him which was further defined by the Act of 1764, and penalties for failure to carry out his duties involved loss of office, disqualification from being a royal Governor, and a fine of £1,000. Proprietary Governors were obliged equally to take the oath, and also to give security for due performance of their duties, but those of Connecticut and Rhode Island were seldom sworn. The Act of 1750 imposed a penalty of £500 and ineligibility for any office of trust on any Governor who did not suppress iron and steel manufactures as directed in the Act.

The duty of reporting fully on the colony was imposed by royal instruction. Particulars were required of economic conditions, progress of settlement, statistics of population, and state of commerce and industry with suggestions for improvement, details of revenue and expenditure, and official establishments and governmental institutions. Military resources and risk from Indians or foreign colonies were to be notified, and all laws and journals of the houses of the legislatures must be forwarded. The instructions were poorly obeyed despite protests and threats by the Board of Trade and the House of Lords in 1732, until Halifax in 1752–61 and Hillsborough in 1763–5 insisted on more regular transmission.[1] It is admittedly open to doubt if this study of dispatches and laws was wise, for colonial relations demanded rather abstention from criticism than the intervention which knowledge almost inevitably involved.

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[1] C.C. 1681–5, pp. 757, 763. Albemarle had power as Vice-Admiral to suspend naval officers; C.C. 1681–5, p. 293. Lowther of Barbados complained of lack of it; C.C. 1711–12, pp. 237, 292; 1712–14, no. 69; A.P.C. ii. 778. The Board in 1715 suggested reversion to the former usage of placing captains under the Governors; J.C.T.P. 1715–18, p. 3. But when in 1763–76 the navy was used to suppress smuggling it acted under the Admiralty, and deputations from the Commissioners of Customs; cf. the *Gaspée* (1772), A.P.C. vi. 519 ff.

2. *The Governor's Powers as to Appointments*

In matters of local government the Governor under his commission was endowed with a very wide delegation of royal prerogatives, to which were added such additional powers as might be granted by statute, enlarging or much more often contracting the spheres of his activity. The theory of the constitution was simple. The legislature ought to pass acts and produce necessary funds, which would be disposed of by the executive in accordance with the will of the Crown subject to any legislation. But direct intervention of the legislature in determining the actions of the executive was regarded as wholly improper, and a complete invasion of the prerogative of the Crown. In England itself constitutional development was to take the form of the control of the ministry by Parliament and therefore the abstention of Parliament from intervention directly in executive matters. In the colonies, however, the direction of progress was very different. The legislatures advanced to the position of seeking by their Acts to direct the executive government minutely and to deprive it of any independence. Hence in every sphere the record of the periods is one of disputes between the Governors and the Assemblies in which ultimately victory normally rested with the body which possessed the power of the purse.

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[1] A monthly postal service to New York and the West Indies was first arranged in 1755; before this transit was very slow, dispatches to North Carolina sometimes taking years to arrive via Virginia; in war losses were severe. Correspondence was addressed to the Secretary of State and Board of Trade; see ch. xi, §§ 3, 4.

A vital instance of this lies in the case of appointments. The power to appoint officers for the execution of the laws is an essential royal prerogative, and we accordingly find that full power of appointment of every kind of officer on land and sea is conferred on the proprietors by the Maryland and Pennsylvania charters. The Governor's commission empowers him to appoint judges, justices of the peace, sheriffs, and other necessary officers for the better administration of justice, and putting the laws in execution, merely requiring him to select persons well affected and of good estate. His power to remove is also given in wide terms; there must be good cause and the removal is to be reported to the Crown. In Massachusetts, however, there was a division between classes of appointments elsewhere unknown; the Governor and Council were to appoint judicial officers, the General Court others, and the Council at first tried to insist even on nominating the former. This restriction in the case of judicial officers was applied to royal governors in 1709 onwards, and, as already mentioned, was later reinforced, to require the assent of three Councillors. Moreover the Crown regularly, as already mentioned, reserved certain posts for its disposal, Secretary, Receiver-General, Auditor, Surveyor-General, Superintendent of Indian Affairs, Chief Justice, Attorney-General, and sometimes Clerk of the Assembly. The Council naturally liked to share patronage when it could, but Spotswood in Virginia insisted on his own power and in 1727 we still find him possessed of a very wide patronage, which was true of Georgia and generally. Belcher in New Hampshire in 1730 claimed the patronage, but was willing to hear his Council's advice and he applied the rule in New Jersey. In North Carolina the Council shared in the appointment and removal of judges and justices as a matter of course. In South Carolina the Governor's patronage, apart from military offices which in all the colonies was his, was confined to posts, like justices, of little or no emolument. In Maryland the Governor's powers were sharply limited by the proprietor, who was wont to put friends in office, and to allow his relatives, such as Cecilius Calvert, his secretary, to levy fees from appointees. There was, of course, nepotism among Governors, but the power of appointment[1] and the corresponding right of removal could be used for political ends; Morris in New Jersey rewarded the late Speaker for his aid by a judgeship, while Dobbs in North Carolina dismissed from his offices the leader of the opposition.

The Assemblies, for their part, were eager to limit the discretion of the Governor. Laws requiring that only residents should be appointed were early passed in New Jersey and Maryland. Sheriffs were objects of special care because of their extensive powers; Maryland restricted tenure to two or later three years; similar action was taken in New Jersey, North Carolina, and Delaware. Virginia in 1705 required three years' residence, service as justice of peace, and selection from three names submitted by the County Court, the last provision being an imitation of the Pennsylvanian rule, which applied under the Charter of 1701 to coroners also. While such measures were more or less natural and legitimate, leaving a reasonable power to the Governor to exercise the appointing power, the Assemblies often advanced much further, and used the power of the purse to deprive the Governor of the authority he normally possessed, either by refusing salaries to his appointees or even those of the Crown or by more direct means to be described below. In the case of New York the Assembly seems unquestionably to have used the power to fix salaries annually to reward or punish judges, according to the manner in which they decided on issues interesting to the controlling spirits in that body.

The practice of appointing officers generally was granted to the General Court by the Massachusetts Charter, and Pennsylvania from an early period imitated this practice by the plan when passing Acts of naming those by whom they were to be carried out; thus for taxes commissioners were named, for loans trustees of the loan office; in 1757 the Governor had to admit the right of the Assembly to appoint Indian Commissioners but still objected to their selecting them from their own numbers; where officers were not selected by the Assembly they were made by Act elective locally, and the patronage of the Governor was strictly limited, a procedure rendered justifiable by the contrast with the profiteering in offices of the proprietary government of Maryland. New York similarly entrusted to commissioners charge of its new undertakings, and appointed by Act collectors and excise commissions, the tendency in all colonies being to engross the appointment of financial officers. New Jersey imitated the neighbouring colony, and the mode of encroachment is early illustrated by the Act passed in Queen Anne's war for a subsidy of £3,000, which named two treasurers, and also commissioners for managing the Canadian expedition and a commissary; it similarly appointed commissioners to carry out the supply Acts for military aid in the last French war, and, though Bernard was instructed not to assent to such Acts, he had to do so on pain of losing any grant. Naturally it was simple to extend the rule to commissioners of roads, bridges, barracks, river navigation, and boundaries. Matters went further in South Carolina as a result of the weakness of the proprietorial régime; in 1721, after the establishment of the provisional royal régime, it was ruled that the Treasurer, comptroller, powder receiver, and all other civil officers paid from public funds should be appointed by the Assembly, and it regularly appointed commissioners and agents to deal with the Indians and military supply commissioners. It was quite in vain to instruct Johnston in 1729 not to assent to bills vesting appointments in the Assembly, for in 1748 Glen reported that the executive government, including all financial officers, and commissioners for markets, the workhouse, pilots, fortifications, &c., were always appointed by the Assembly which managed ecclesiastical preferment, and was rewarded by diligent public prayers, which were denied to the representative of the Crown. Other colonies went less far, but commissioners to execute special Acts were everywhere on record on the continent and in the West Indies.

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[1] See Spotswood, 1713; C.C. 1712–14, p. 276.

3. *The Control of Salaries and Fees*

In theory it was the Governor's duty to regulate with the advice and consent of the Council all salaries and fees for officers, while the Crown on its part would determine the salary of the Governor. Thus the early instructions forbade the specification of the Governor's salary by Act, requiring instead that it was to be granted to the Crown with a request that the Governor be allowed to have it, otherwise the sum to go to some other purpose stated in the Act. But in 1703 the Governor, who had already been instructed to ask permanent settlement of other official salaries, was instructed to obtain a permanent grant for his office, and in some cases ordered to accept nothing else, to prevent the abuses of temporary grants, which made the Governor dependent on the Assembly. At the same time it was laid down that, when such a salary was obtained, the system of presents which was customary in New England must cease, so as to prevent the Assembly from thus influencing the loyalty of the Governor.[1] In Virginia, Maryland, Barbados, the Leeward Islands, and Jamaica the permanent revenues eased the situation by rendering applications for salaries needless, while later in North Carolina, Nova Scotia, St. John's, Quebec, Senegambia, and Georgia similar independent sources existed.

The struggle was immediately begun in Massachusetts, where Dudley in 1703 and 1705 urged his instructions as regards himself and judicial officers on the Assembly, but only to meet with a refusal, which he bore with equanimity on the whole because of private means. Shute in 1716–22 renewed the struggle, but made no impression, and on his report of the misdeeds of Massachusetts, and its defiance of the wishes of the Crown, the Board of Trade suggested that a salary should be provided for him imperially, pending the passing of an Act to amend the Massachusetts Charter and bring the colony under proper control.[2] At this juncture the royal power might have been used, but the inertia of the Walpole régime saved the colony anything worse than a supplementary Charter in 1725, accepted by it in 1726, giving the Governor specific power to approve the Speaker, and forbidding the lower house to adjourn for more than two days without his consent. The weakness of the position of the Crown was finally revealed when Burnet in 1728–9 made a loyal and determined fight for a salary of £1,000, declining firmly £3,000 currency as a personal gift. His argument was based on the British usage to grant a civil list for life to the Crown, rendering it possible for the executive to act honourably and justly, while, under the existing régime, bills were secured passage by the withholding of the salary grant until assent had been given. The Assembly insisted that the Governor should be dependent, that he had no permanent interest in the colony as the King had in the realm, and might be negligent if his salary were ensured; it was insisted also that he had great power over the Assembly, which should have some authority on its part. The Board of Trade commended Burnet's firmness and recommended application to Parliament, despite the representations of the agents of Massachusetts, but there was an air of unreality and the colony was assured that action was not really meant by Newcastle. Burnet, however, by dissolutions and fixing meetings of the General Court at Salem and Cambridge might have beaten down resistance, but his sudden death, 7 September 1729, lost the day. Belcher was instructed to persist in demands, but allowed later to accept temporary grants, and in 1735 a general permission to do so was accorded him, the Board concluding that it could not force a permanent settlement under the Charter. Shirley in 1741 was again requested to ask for permanency, but, of course, in vain.

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[1] A.P.C. ii. 427–33.

[2] A.P.C. iii. 104–11; J.C.T.P. 1718–22, p. 315; 1723–8, pp. 229 f., 282 f.

In New York the fight began in 1710. Originally, as the import and excise duties were lodged with the Receiver-General and used under warrants by Governor and Council no question arose, but in 1709 the Act of 1702 extending one of 1699 expired, and, as the danger of dependence on the Assembly was fully realized, Hunter was instructed to demand a permanent civil list. On refusal bills were in 1711 and 1713[1] drafted to be enacted by Parliament and to lay down a revenue on the existing basis. These important measures, however, were never discussed by Parliament, partly because in 1715 Hunter obtained a temporary grant for five years, and the Hanoverian dynasty craved colonial peace. Burnet in 1720 had to acquiesce in the fixing of salaries, when supplies were granted, by resolution, though he demurred to doing so in 1726. But the point was conceded in 1729 by Montgomerie. In New Jersey Cornbury was bidden obtain a permanent revenue, or one for twenty-one, or even eleven years, but he had to accept a grant of two, and then for one year, and Hunter, Montgomerie, and Cosby were no more successful. Better luck was hoped for in 1738 when an independent Governor and a local man, Lewis Morris, was appointed. He was told to obtain a full civil list including contingencies for the Council and Assembly, but could only obtain a three-years' grant, and Belcher from 1746 did no better.

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[1] C.C. 1711–12, pp. 145–7; 1712–14, pp. 167 f., 170, 174, 287. An act of 1683 under Dongan giving a permanent revenue was held void; Channing, *Hist.* ii. 297 ff.

New Hampshire was a little more reasonable, at first giving a Governor a salary for the term of office, but later would give only yearly grants. When Halifax took charge he determined to reopen the issue. The Board on 1 June 1750[1] recommended for New Jersey an independent salary from British funds for the Governor and a military force to meet the rioting, but this was too radical a step to be taken. In 1751[2] it lamented the failure of New York to adhere to its views, and in 1752 firm instructions were given to the Governors that they must obey their instructions to secure fixed revenues. Osborn in New York in 1752 was forbidden to assent to any temporary bill, and ordered to dismiss any Councillor who did not oppose the encroachments of the Assembly, but on his suicide De Lancey could do nothing, and in 1755 Hardy was allowed to accept temporary grants. Under war stress general permission was given to the Governors there and in Massachusetts to take what the Assemblies would vote. But Dobbs in 1754[3] was told to ask North Carolina for a permanent grant, as the quit-rents were badly collected; Nova Scotia like Georgia derived funds from the British Exchequer, but the ideal of an independent revenue was one which was to bear fruition in Townshend's legislation of 1767.

The effects of the colonial policy are obvious; Clarke's assent to the New York Triennial Act was said to have been brought about by desire to have his salary; in 1721 and 1727 Massachusetts made salaries depend on assent to Acts, Lewis Morris recorded a similar policy of New Jersey, and the Council of South Carolina deplored temporary grants on this score. In Pennsylvania the Assembly in 1709 laid down the sound principle that redress of grievances must precede money grants. Keith bargained with it for his assent to bills, with much profit; Denny in 1759 allowed the issue of bills of credit in return for £1,000, and several bills next year were similarly bought, on the maxim of Franklin that the subject's money is never so well disposed of as in the purchase of good laws. Only thus, patriots held, could an overseas immigrant be induced to have prime regard to the country's interests as opposed to the commands of the King.

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[1] A.P.C. vi. 287 f.

[2] Ibid., vi, no. 488; iv. 209, 280–3.

[3] Ibid., iv. 187; cf. 360 f.

As regards fees the rule was clearly laid down by the Board of Trade in 1708 in respect of protests from New Jersey against levying of fees otherwise than by Act in accordance with Magna Carta, that 'no fee is lawful unless it be warranted by prescription or erected by the legislature', and Burnet's levying fees for passes in Massachusetts contrary to practice was disapproved.[1] Clearly, however, if services had to be rendered, fees were legitimate by English practice, and regulation of such fees by ordinance of Governor and Council was held legitimate; Hunter in 1709 was told to regulate fees thus in New Jersey, a local Act being disallowed, and in 1757 Dobbs of North Carolina was informed that both methods were legal, though doubtless an Act would have overridden any conflicting ordinance; presumably the Governor and Council might not reduce fees permitted by Acts. In many colonies fees were regulated as of course by Acts; Copley in Maryland recognized this to be sound, and in 1736 Johnston in North Carolina advised the Assembly thus to act. Both methods were adopted in most colonies, including Virginia, New York, New Hampshire, and Maryland as well as the West Indian colonies.[2]

4. *The Control of Expenditure*

The official theory enjoined the Governor with the consent of the Council to issue warrants for all expenditure, not merely salaries and fees. In theory, therefore, he was to ask the legislature for supplies, have them voted, and then dispose of them at his discretion, subject to the two checks (1) that accounts must be rendered to the home government, whose agent was the Auditor-General with his deputy in the colony, and (2) that the Assembly should be allowed to inspect the accounts, thus giving it the opportunity to criticize the employment of its money. A certain latitude was left in early usage by the absence of detailed appropriations, though Jamaica succeeded in 1675–7 in enforcing them. But especially after the disastrous rule of Cornbury in New York (1702–8) a widespread suspicion of Governors resulted in a campaign which, firstly, deprived them of any discretion and merely gave them the function of accounting officers to authorize expenditure on the basis of detailed appropriations, and, secondly, took away even this check on expenditure by handing over control to officers independent of them and subservient to the Assembly. Unquestionably New England influence counted for much in this plan, for the colonies there were accustomed to control all expenditure minutely, and Massachusetts, as a royal colony inheriting New England principles, served to aid the transition in the others. Cornbury, and in 1732 Cosby, bear testimony to New England influence, Morris in 1743 adds that of Pennsylvania to which Sharpe in 1758 ascribes the attitude of the Maryland Assembly, while Nicholson of South Carolina found the source of unrest in New England influences.

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[1] A.P.C. iii. 254 f.

[2] In 1764 an instruction was given that all fees be published and only legal fees taken; A.P.C. iv. 670 f.

The process is best seen in New York.[1] In 1704 the Assembly demanded that money raised by taxation should be deposited with its treasurer, responsible to it alone. It refused to allow the Council to amend this proposal, and in 1706 want of funds compelled the Governor to yield, though the Board of Trade solemnly denied the right of the Assembly to usurp sole control of money bills or to claim the privileges of the Commons in England. It, however, made the fatal concession that, if New York voted extraordinary taxes, it might then have them lodged with its treasurer and payment be made on receipts, in lieu of warrants of Governor and Council. The Act therefore appointed a treasurer and commissioners to supervise the expenditures whose warrants alone were to be acted on by the treasurer. In 1708, 1709, 1711, and 1712 the Acts gave the treasurer control and allowed him to pay on receipts by the payees, including in 1711 the Governor himself. In 1713 the import duties imposed for the ordinary support of the government were receivable by the Receiver-General, but he was to be accountable to the Treasurer. In 1715 a compromise was effected; the Governor in Council might issue warrants for ordinary expenses of the Government, but the Treasurer became custodian of the public taxes, without accounting to the Auditor-General, and was sworn only to pay out as provided in specific appropriations by

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[1] N.Y. Col. Docs. iv and v. The Assembly insisted that it sat of inherent right, not by royal summons, that the erection of a Court of Equity save by law was illegal, and fixing fees required an Act; C.C. 1712–14, pp. 167 f., 183 f.; 1711–12, p. 298; A.P.C. ii. 638–42.

Act. The price for even this concession was assent to the issue of bills of credit contrary to his instructions. So dearly was this five-years Act purchased. In 1737, when the last of these quinquennial measures expired, Clarke was at loggerheads with the Assembly on the accounts, and no appropriation Act was passed until 1739, when the Assembly triumphed. Henceforth bills were annual; salaries of officers were set out by name and amount; receipts were to serve as vouchers, save that the Governor in Council might issue warrants for his own pay and that of the chief officers. All other expenditure was specifically appropriated. By this device the Assembly could in effect control all appointments and punish or reward judges or others according as they pleased them or not. As a special favour a contingencies fund of £100 was allowed. Hunter, needless to say, was bitter in his attacks on the Assembly, but, as has been mentioned, the bills to impose a revenue never even reached consideration in Parliament, and the Council had to acquiesce in its exclusion from finance. In 1744–8 naturally the Assembly asserted its power; when it voted funds, it placed their control —and to some extent that of its forces—under commissioners, and when Clinton on the close of hostilities tried to regain control, he could effect nothing, and had to appeal to the Board of Trade, which in 1751 elaborately diagnosed the evil,[1] but, as seen above, without any result. In 1768 we find the Treasurer giving bond to the Speaker.

New Jersey, if rather later in asserting its rights, was not less thorough. In 1739 it denied absolutely the Council's right to amend a money bill, and in 1740, in granting £2000 for transport of troops to the West Indies, it appointed commissioners to control expenditure, refusing absolutely to allow any change by the Council. In 1749 it again refused to allow a bill of supply to be touched, and the Council could not prevail. The Treasurers for the two portions of the colony were not indeed appointed by it, but they were compelled to account to a Committee of both houses in which the Assembly had five members to three of the Council.[2]

Massachusetts had, of course, the election of the Treasurer, and Shute found that it completely controlled expenditure, and as early as New York and New Jersey intruded on the military

[1] N.Y. Docs. vi. 614–703; A.P.C. vi, no. 488.

[2] N.J. Arch. vii. 466–528.

prerogative.[1] The elected Council was less helpless than in other colonies, but it had to work tactfully, and in 1732 Belcher warned the Board of Trade of the increasing power of the Representatives. Nothing was done, and in the French wars Massachusetts controlled fully the aids and forces provided. One small point was yielded for a time, the right of the House to scrutinize the muster rolls and then order the Treasurer to pay, for orders were given to the Governor[2] not to accept any bill authorizing such a procedure, which, however, New Hampshire also practised to the disgust of Wentworth.

The evolution in South Carolina was interesting.[3] Under the royal government of 1719, put in force in 1721, the Treasurer and other revenue officers were made by Act to be appointed by Ordinance assented to by Governor, Council, and Commons House of Assembly in lieu of being elected by the Commons alone as under the proprietary régime. Up to 1731 annual estimates were framed, and expenditure was incurred on authorization by Act or Ordinance of the General Assembly. From 1732, however, the more common American plan of working on credit was adopted; at the close of the year accounts were presented, audited by Committees of both Houses, and then an Act passed to raise the necessary funds to be expended according to the schedule laid down in the Act; moreover at first Governor, Council, and Commons approved specifically each actual payment. At a later date the Assembly invented the ingenious plan of giving orders by itself to the Treasurer; and it was a payment in this way to the Society of the Bill of Rights in London to aid their political propaganda, in 1769, which evoked the strong disapproval of the Board of Trade, and resulted in an instruction to the Governor not to assent to any Act to replace money taken thus illegally from the Treasury, while the Attorney-General was instructed to prosecute the Treasurer. The Council, Bull reported in 1769, had vainly endeavoured to stem the advance of the Commons; in fact from 1735 it was engaged in a steady fight to retain the right of criticism of money bills, which in 1739 ended in a compromise which endured to the revolution, and which allowed the upper house to make suggestions of change. The growing hostility of the Commons, however, was obvious in 1773 when the Commons through Garth, their agent in London, asked for the dismissal of those members of the Council who ordered the imprisonment for breach of privilege of the printer of a protest of two Assemblymen against a Council resolution on two bills sent by the Commons. The Commons aided by W. H. Drayton in the Council asserted that the Council was not an Upper House at all, and though the Court of Common Pleas asserted that it was, the claim was denied by another court on 3 September 1773, and Drayton was rendered so elated by the failure of the Imperial government to make any declaration on this head that the Governor had to remove him from the Council.

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[1] A.P.C. iii. 92–104.

[2] A.P.C. iii. 331–4 (1729–31). This varied the charter power of the Council.

[3] A.P.C. v. 229–36; vi. 474–6, 564–7.

In North Carolina the royal government inherited the rule by which the Treasurer was the nominee of the lower house, and though appointment by Act of treasurers—two from 1748—was introduced and in 1760 the Council was allowed to suggest another name, the real control admittedly remained with the other house, whose Speaker Moseley long combined the office of Treasurer with his own and largely controlled policy. The system of paying *ex post facto* was normal; accounts were passed by a Committee of two Councillors and six to eight nominees of the lower houses; if the accounts were approved, then the Speaker could issue warrants for payment even if, as Dobbs did, the Governor declined to act. In both Carolinas quit-rents might have been exploited to give effective returns, but the royal appointment of McCulloh as Commissioner of Revenue and Land Grants led practically to nothing but friction with the Governors and officials who were united in objecting to interference with their land dealings. Dobbs ultimately in 1758–62 was engaged in efforts to extract revenue bills in return for concessions as to the erection of courts.[1]

In the case of Virginia from 1704 to 1738 the offices of Speaker and Treasurer were normally combined, but thereafter the Treasurer was appointed by Act, though the nomination virtually rested with the lower house. Even so, it was common in money bills to appoint commissioners to dispose of funds with, however, the consent of the Governor. This control was insisted on, and an Act of 1766 giving the Speaker £500 salary was disallowed because the Governor's warrant was not made necessary.[1] The quit-rents, however, diminished financial conflicts. In Maryland the lower house was more assertive than the Burgesses of Virginia who did not use the power of the purse to coerce the Council. It insisted in 1740 on denying the Council any power to amend money bills, and, despite the effort of the Council to force alteration of its position, by withholding other measures, it was forced to yield. As early as 1723 the Assembly had denied the Councillors any remuneration from public funds, and in 1732 had forced them to agree to appointment by the legislature of commissioners to execute the currency law. It lost, however, after 1736 the appointment of Treasurer, Willes A.G. advising that the power to appoint still lay under the Charter with the proprietor.[2] In 1756–62 the lower house successfully manipulated its quarrel with the upper as to taxation bills to excuse the colony from any participation in the war. In Pennsylvania[3] the Council was denied any legislative power, and even the right to act for the proprietor in the absence of a Governor. The Assembly claimed the sole right to tax, grant, and pay, the Speaker issuing warrants to the Treasurer even for the Governor's salary. In the war it used the refusal of the proprietors to accept taxation of their estates as an excuse for failing to support the Imperial cause. Worse still, it authorized in 1755 without the knowledge of the Governor the borrowing of £5,000 on the credit of the house, and two months later when he refused to accept a proposal to raise £25,000 by bills, it issued a loan of £10,000 on the same basis.

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[1] A.P.C. iv. 502–6.

Georgia[4] was nearly induced by a misstatement in 1761 of the Chief Justice, who was removed on that account, to refuse payment of salaries to public officers on the score that the Imperial Treasury would provide funds, but its dependence on Imperial aid retarded the development of controversy, as also was the case in Nova Scotia and the Floridas. The West Indian islands asserted energetically their rights; Jamaica[5] in 1753 declared that 'it is the inherent and undoubted right of the representatives of the people to raise and apply moneys for the services and exigencies of government, and to appoint such person or persons for the receiving and issuing thereof as they shall think proper', to which the House of Commons replied by voting on 23 May 1757[1] that the resolution 'so far as the same imports a claim of right in the said Assembly to raise and apply public money, without the consent of the Governor and Council, is illegal, repugnant to the terms of his Majesty's commission to the Governor of the said island, and derogatory of the rights of the Crown and people of Great Britain'. In fact, however, whenever taxes were newly imposed, the Assembly did provide for control by its own committees of receipt and issue, and it endeavoured, not unsuccessfully, to deny to the Governor and Council their legal share in appropriating the surplus of the receipts granted by the permanent revenue law of 1728 by tacking an appropriation to a revenue measure.[2] In 1782 it was candidly admitted that in Barbados it had long been the established custom, which must be sanctioned by changing the royal instructions to accord with it, to provide by Acts for commissioners to carry out expenditures, whose warrants were authority for the Treasurer's payments, while in others direct power was given to the Treasurer; moreover, it was conceded that by long usage the appointment of the Treasurer appertained to the Assembly.[3] In 1769 the Board of Trade refused approval of the proposal of Dominica to allow the Governor to issue warrants only on certificates of the validity of claims given by a Committee of three members of Council and five of the Assembly, as unnecessary and inconvenient when the legislature was dissolved.[4] But in 1771 it would not go so far as to disallow a St. Vincent Act which allowed the Governor to issue warrants only on the assent of the Council and Assembly. It merely suggested that the purpose of this provision could better be served by strict appropriation and security being taken for due carrying out of the provisions of such appropriations, and it admitted that the American colonies had long ceased to obey the Instructions.[5] In 1753 it recommended acquiescence in the rule of appropriation by Governor, Council, and representatives of the Assembly in Bermuda,[1] and in the Leeward Islands[2] the Assemblies retained full control over the revenues other than the 4½ per cent. duty on exports.

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[1] A.P.C. iv. 346; v. 125 f.

[2] Chalmers, *Opinions*, i. 165 f.

[3] A.P.C. iv. 288, 337, 341, 346 f., 440 ff.

[4] A.P.C. iv. 536 f.

[5] Hamilton reported the Assembly's refusal to allow the Council any right to amend money bills to provide for the Imperial garrison, and its claim of the right to adjourn itself; J.C.T.P. 1715–18, pp. 269 ff.

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[1] *Journals*, xxvii. 910 f.

[2] A.P.C. vi. 477, 486–91; cf. 324 ff. (Knowles, 1754).

[3] A.P.C. v. 525 f. The Board of Trade vainly sought to assert the rights of the Council in 1713; C.C. 1712–14, p. 208.

[4] A.P.C. v. 198–200. Barbados had one of four Councillors and six Assemblymen from 1708.

[5] A.P.C. v. 303–5.

The result of these facts was inevitable. The local governments were largely ineffective because they had no means. Thus, as in the crucial instance of the long-protracted riots in New Jersey,[3] directed against the land rights of the proprietors whose offers to submit to legal decision were ignored, it proved impossible to prosecute in the absence of funds to pay attorneys; to obtain reports because they must be paid for, as no officer was employed to furnish them; to repress rioting as in New Jersey, or to enforce the laws of trade or put down manufactures, for the Governor had no police or military force under his effective control, and no secret service; without funds defence was imperfect and the French saved from the normal outcome of numerical inferiority. A consistent Indian policy required police to preserve order and protect trade, and courts to secure that Indians' lands were not usurped. The Board of Trade saw the facts perfectly clearly; they pointed out to Pownall in 1758[4] that in Massachusetts the sovereignty of the Crown was on a precarious footing, that almost every act of legislative and executive power, political, military, judicial, was ordered by resolves of the General Court emanating from the lower house to which all applications, petitions, and representations were addressed, and which was the virtual power in the colony. To Bernard in 1759[5] they insisted that the use of commissioners to execute Acts deprived the executive government of all authority, while the Treasurers were required to pay to them funds provided by the legislature and they were accountable to the Assembly only, to the utter ignoring of the Governor. But, as in the case of their wise words in 1751 as to New York, nothing could be done, because war conditions dictated harmony. But the peace was expected to bring relief, and on 13 July 1764[6] we find the Board indefatigably writing to Franklin of New Jersey to denounce the annual supply act, because it granted salaries by name, thus

[1] A.P.C. iv. 229–31. See p. 163 *ante*.

[2] Cf. A.P.C. iv. 163 f.

[3] A.P.C. iv. 76–81; vi. 310, 312–15.

[4] Mass. *Acts and Resolves*, iv. 95.

[5] N.J. Arch. ix. 155.

[6] Ibid. 444.

transferring to the Assembly a negative on their appointment and further actually appointed officers instead of leaving that to the Governor.

The predominance of the Assemblies suggests that there might have developed the germ of responsible government especially in cases where, as in Virginia from 1704–38 and North Carolina, the offices of Treasurer and Speaker were often combined. But, of course, the position of the Governor obscured the possibility of such evolution, and the circumstances of the genesis of the United States prevented any development in this sense. In fact, of course, while the power of the Crown was destroyed, no unity of administration was created in lieu; the executive authority was shared out between committees or commissions or officials, whose responsibility to the Assembly was distinct and who were subject to no effective co-ordination and often were under very nominal control.

There were, it is true, certain revenues over which the control of the Crown remained, and which properly were paid to a Receiver-General, not the Treasurer. The prerogative of the Crown extended to the colonies and gave it, therefore, the proceeds of fines and forfeitures, of escheats in case of felony and failure of descendants,[1] of *bona vacantia*, treasure trove,[2] wreck, flotsam, royal fish, including whales,[3] droits of the Crown as opposed to those of Admiralty, prizes and prize dues, as well as quit-rents for granted lands, licences to pasture, and other licences, e.g. to cut timber,[4] and royal mines.[5] There were also grants under Imperial Acts such as the share in vessels and cargoes condemned for violation of the laws of trade, and appropriations under local Acts, as for import and export duties, fines, forfeitures, licences, &c., when these were made payable to the Crown without other appropriation. In these cases the final power to direct expenditure from the sums available rested with the King, whose control over the revenues and their employment was exercised through the Treasury with the Auditor-General and his deputies. In some cases the sources available rendered it possible to make grants from time to time where the Assembly withheld funds. Thus Virginian quit-rents afforded means of various grants for defence and other purposes, and New York judges and attorneys-general were now and then provided for from the growing quit-rents in that province, a source which was relied on to provide the civil establishment of Prince Edward Island, a salary for the Chief Justice of South Carolina from 1735, and later was contemplated as a means of rendering the government of Canada independent of the legislature, a consummation which was never attained in this period. In Jamaica the casual revenues, quit-rents, fees, forfeitures, and escheats were surrendered for the civil list of £8,000; the surplus was at the disposal of Governor, Council, and Assembly, and strong resistance was opposed by the Council to the effort of the Assembly to assert control over it; the cost of the troops, however, rendered dependence on the Assembly unavoidable, and much hardship fell on them through refusals of appropriations, as they depended largely on their extra pay.[1] The 4½ per cent. duties of Barbados and the Leeward Islands, on the other hand, were in considerable measure collected at wasteful expense, and of the balance an undue sum was retained by the Crown to the detriment of the colonies. The effort to impose a like duty on exports of the Southern Caribbean Islands, Grenada, St. Vincent, Tobago, and Dominica, failed through inadvertence in imposing the duty after the grant of Assemblies, and the legislatures showed no haste to carry out the royal requests for voluntary grants as originally in the other islands.[2] In Canada and the ceded islands, however, the King could claim the continuance of the royal revenues enjoyed by the French King, but in Canada British merchants soon declined to pay the imposts on imports, and recourse had to be had to Imperial legislation.[3]

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[1] Chalmers, *Opinions*, i. 121–9, 134–6. For Virginia cf. Osgood, ii. 240 ff.

[2] Ibid., i. 130 f. (Fane, 1737).

[3] Ibid., i. 131 f. (Northey, 1713). Right waived in 1730; A.P.C. iii. 264 f.

[4] Ibid., i. 110–20, 136–40.

[5] Ibid., i. 120 f. (1723). Royal control of fines, forfeitures, and escheats was reinforced in 1753; A.P.C. iv. 185, 187, 208.

5. *Minor Civil Prerogatives*

The Governor was charged with the custody and control of the public seal of the province, which was determined by authority of the Crown;[4] this office was valuable in respect of fees charged for grants under it, as in the case of the incorporation of cities. It was also his function in the royal provinces to make grants of land, with the advice of the Council, reserving quit-rents as might be desirable. This matter was of special importance in the early days of the colonies, but its importance was always considerable, and in the period from 1763–74 a determined effort was made to use the power to give instructions to carry out a policy of securing lands belonging to Indians from intrusion. The Governors of New York were specially accused of misemployment of this power, and Bellomont, as has been seen, found the colony sadly hampered by his predecessor's wicked grants. The matter was naturally one in which the legislatures took keen interest, but the Imperial power of disallowance was used to prevent any complete removal of the power from the hands of the Governor.

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[1] A.P.C. iv. 704–13; v. 180 f.; vi. 324 f., 477, 487–91.

[2] A.P.C. iv. 615–17; v. 544; see ch. i, § 2.

[3] A.P.C. iv. 725 f.; *Masères Letters*, pp. 49 f., 88–91.

[4] For change on royal accessions see A.P.C. iii. 158 (1727); iv. 462 (1760).

The Governor was further authorized to grant charters of incorporation including grants to towns, but the power to incorporate was equally possible of being conferred by Act. He might also appoint ports and harbours, and allow the establishment of markets and fairs, and grant ferries. But in these cases again there was a concurrent right of legislation, which was curbed, when desired, by the power to disallow.

The Governor had also authority to administer the oaths provided by statute as to allegiance and supremacy to any person residing in, or visiting, the colony. Akin to this power as a means of securing tranquillity was the power given in early commissions or instructions to prevent the setting up of presses or publication of any book without the Governor's licence. In Massachusetts the rule was for some time enforced, but, when Shute in 1719–20 endeavoured to use it to punish publication of an attack by the House of Representatives on the Surveyor of Woods, the Attorney-General and Council held that there was no ground on which to proceed, and in 1721 the House ruled that a measure to establish a system of licences for books would be seriously inconvenient. The last attempt—by the House of Representatives—to enforce the doctrine failed in

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The Governor was always instructed to proclaim the accession, order prayers, &c., and was provided with the royal portrait and arms for the Council chamber and Supreme Court. The private seal of a Governor might be used if customary; Chalmers, i. 240–2 (1736). He was styled Excellency locally.

1723,[1] and the later instructions drop the power, whose legality was clearly incapable of defence.

6. *The Military Prerogative*

The Governor's commission conferred on him the right by himself or officers of his appointment to arm, muster, and command all persons within the province; to move them from place to place therein and to transport them to other provinces, in order to protect them from invasion; to repel enemies, pirates, and rebels and pursue enemies out of the province, and generally perform the functions of a commander-in-chief. With the consent of the Council he might also erect fortifications and provide them with supplies, and in time of war exercise martial law.[2] In Massachusetts the last limitation of power was expressly laid down in the Charter, and in addition the Governor could not move men out of the province save with their consent or the authority of the General Court. The restriction on action beyond the colony was enforced elsewhere; the Georgian militia organized under an Act of 1755 was for local service, that of North Carolina in 1759 would not march against the Cherokees. In Pennsylvania and Maryland whose proprietors had full military authority Sharpe's desire to send troops away in 1757 and the proposal to use Pennsylvanians against the enemies of Virginia were objected to by the Assemblies. But even as regards preparations in the colony itself the military prerogative was wholly useless without the support of the legislature. It was impossible to train troops without funds, which had to be voted, and it was equally impossible to manage them without penal provisions. Hence legislation was constantly resorted to, as in the Georgian Act mentioned, which is largely in common form. It authorized the Governor to enlist men between 16 and 60, to fix the number of men in companies, in time of necessity to raise as many regiments as necessary, with the consent of the Council, and to march them to any point in the province; to draft men and impress boats and arms; penalties are imposed for disobedience to orders. This need of law and of finance gave the Assemblies an enormous power; New York and New Jersey insisted on annual Acts, and did not even always pass them; in 1752 Clinton reported that for four years no Act had been made, and North Carolina would not legislate for years. Quakers in Pennsylvania and New Jersey interposed a serious barrier to effective training or aid in war. In 1755 the Pennsylvanian Assembly produced an Act which Dinwiddie of Virginia stigmatized as a joke on all military affairs, and which was disallowed,[1] as it allowed election of officers by ballot and provided no serious penalties for offences. The Assembly, nothing abashed, declined to abridge liberty in 1757, and expressed disapproval of Delaware for giving power to the Governor to make regulations. Maryland was as bad. When Sharpe proposed to lead an expedition westward under his commission and an Act of 1715 authorizing action in event of invasion, he was told that neither document gave him the power; the Act was spent and in any case it referred to invasion, while all that had happened was an incursion, a quibble which did not appease his warlike temper. Virginia and South Carolina were more warlike and allowed some discretion by Act to the Governor to exercise control of funds to meet warlike emergencies. In the case of Connecticut and Rhode Island the efforts to place their militia under the control of the Governors of New York and Massachusetts, which were made under William III, left a reminder in the commissions given to Dudley and Shute of Massachusetts, but nothing substantial ever came of these attempts. Connecticut had a good deal of military spirit on occasion; in 1709 we find Saltonstall sitting at Fort Anne with Ingoldsby of New York and Gookin of Pennsylvania issuing commissions to military commanders and various orders, and in 1745 Connecticut and New Hampshire co-operated with Shirley of Massachusetts in the Louisburg expedition. In 1754 again, when the Imperial government asked for co-operation in the French war, Shirley of Massachusetts was given a commission as Commander-in-chief of the forces in America, and we hear of a council of war at which he met the Governors of New York, Maryland, Pennsylvania, and Connecticut, while with the Governors of Maryland, Virginia, and North Carolina he planned the Ohio expedition. There was a precedent in 1692 when Fletcher in Pennsylvania was ordered to aid New York and to agree on quotas with New England, Maryland, and Virginia, a task which proved abortive then.

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[1] James Franklin and the *Courant*; Channing, *Hist.* ii. 482 f.

[2] A proclamation of martial law merely suspended the course of justice so far as 'to answer the then military service of the people and the exigencies of the province', and did not prevent the Council legislating; Henley and Yorke, 28 Jan. 1757 (Chalmers, i. 266 f.).

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[1] Another Act was disallowed as it enunciated the doctrine that a standing army was unlawful in peace; A.P.C. iii. 337 f.

On the other hand, there must be set the power of the Assembly through legislation to deprive the Governor of much of his nominal power, and actively itself to control military matters,[1] in the flattest contradiction to the theory of the constitution, and without satisfactory results in practice. It was easy for the Assembly in providing for the raising of men to dictate where they were to be employed; to provide for commissioners or a committee of its members to supervise both expenditure and operations; and to interfere in matters of discipline by the appointment or removal of officers. Shute in Massachusetts in 1722 had a very unhappy time; the lower house attempted to take full charge of military movements by using a committee and disposed of fortifications, ordering moreover by Act the disposition of the forces; it summoned the commanding officer before it to explain why he had not carried out its wishes and compelled his removal by voting no pay.[2] Shirley allowed so much latitude in that way that Pownall had to accept a bill deciding as to the disposition of the forces on the frontier despite its interference with his prerogative powers. In 1757 Pennsylvania's force was divided between garrisons and scouting parties by Act. In 1709 and 1711 we find in New York commissioners of commissariat to whom later were added commissioners of fortifications, and in 1744 the Assembly regulated the militia, appointed paymasters, and empowered the Indian Commissioners to raise scouts. In 1722 Massachusetts and New Hampshire proposed to have committees of war to control operations, but these failed through resistance by the Councils; in 1745 they succeeded in giving such committees charge of the commissariat. In the French war they both went further;

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[1] We find in Jamaica interference even with the Imperial garrison; see A.P.C. vi. 56 (1707). From 1753 it was insisted that no local laws as to such forces be passed, as the Mutiny Act applied (A.P.C. iv. 185 f.), and the Governor had power to confirm Court Martial sentences.

[2] A.P.C. iii. 98–101. In 1747 Clinton reported that the New York militia regiment would not obey orders of the Crown without an Act of Assembly, and the Assembly declared its neutrality with the enemy in Canada; A.P.C. vi. 299–306.

Massachusetts thus had a committee for commissariat and another of five to meet at Albany and execute instructions from the General Court as to the proposed expedition, a course imitated by New Hampshire in 1756. New Jersey, as has been seen, appointed commissioners to manage her military supply and indirectly to control war operations; Pennsylvania pursued a similar course, with the result that Governor and commissioners quarrelled as to the proper action to be taken; Maryland contemplated a bill in which agents would have controlled the forces. There is much force in Chalmers's dictum: 'The King's representative acted merely as the correspondent of his ministers; the war was conducted by committees of Assembly', and, it may be added, by no means well at that.

The Governor was also Vice-Admiral, which would have served to give him authority at sea if the colonies had had substantial naval forces, and in any case provided for action against pirates. His commission came from the Admiralty; it authorized him to collect Admiralty dues and punish offenders against the laws of Admiralty, and for this end to establish and supervise Admiralty Courts. He could authorize in time of war captains of vessels to execute martial law under 22 Geo. II, c. 33, though offences committed on land remained in the colonial jurisdiction. He might in war issue letters of marque against enemies of the Crown;[1] this was done normally on his warrant by the judge of the Admiralty Court, a royal nominee.

The Governor was under orders to afford aid to any Imperial forces, military or naval, which might be sent to the colony. He had, of course, no direct command over such forces unless specially authorized, but, when there was no general officer in a colony, he might give directions for the employment of Imperial forces. Further, the Governors were in control of the small garrisons in Jamaica, St. Kitts, New York, and South Carolina, Bahamas, and Bermuda.[2] Nor in war was it unusual to confer command of Imperial forces on Governors; Oglethorpe in 1737–43 was in control of the Imperial force in South

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[1] For the colours to be worn see Order in Council, 7 Jan. 1730; A.P.C. iv. 187. Cf. A.P.C. iii. 283 (1731).

[2] These forces were under the annual Mutiny Act, not local legislation (A.P.C. iv. 186, 208 (1753): Massachusetts in 1756–7 claimed that the Mutiny Act did not apply there, but itself legislated to give accommodation, evading a crisis; Osgood, iv. 407.

Carolina as well as the troops he was allowed to raise locally, and Shirley in 1755–6 was in command in North America. By the Mutiny Act of that year its terms were made applicable to colonial forces while actually engaged in service with Imperial forces.[1]

7. *External Relations*

As the colonies were essentially dependencies, the powers delegated to the Governors as to external relations were of a modified and limited character. It was the same with the proprietary governments; the Maryland Charter recognizes that war with Indians may be inevitable, and a like permission is given to Pennsylvania, but in that case provisions were included to make it clear that the proprietor could not make war against any friend of the King, nor could he maintain friendly correspondence with States at enmity with the Crown, that is, he was denied the right to declare war or neutrality, and must share in English wars. It was therefore sufficient in the authority of the Governor to include the power with the assent of the Council to take temporary action in unforeseen circumstances, but to provide that he must not declare war save against the Indians in case of emergency, when immediate notification must be sent to the Imperial government. Nor was the power merely nominal; it was taken advantage of by Shute and his Council in 1722 and Shirley was asked to do likewise in 1755, following the course adopted by New Hampshire a year earlier. It was, however, impossible for any Governor to make war with the French.[2]

It followed from the power to declare war, and the general authority to maintain a good correspondence with the Indians, that a Governor might make treaties with the latter. Of this there are many examples, either of action by the Governor or under his authority;[3] Glen of South Carolina in 1746 made a tour for this end, while Oglethorpe initiated agreements in 1733 and 1739 in Georgia, while New Hampshire and Massachusetts concluded important compacts in 1749 and 1754. Later in 1756 the Imperial policy of using special Superintendents of Indian affairs took the work in some degree out of the hands of the Governors. The Governor was also supposed to exercise a control over the commercial relations between Indians and Europeans; the royal theory held that his licence was requisite for permission to trade with or purchase land from these tribes. Such authority, however, obviously needed laws to enforce it, and both Pennsylvania and Georgia provided for the issue by the Governor of licences to trade, while Virginia, New Jersey in 1683 and 1703, and North Carolina recognized the need of the Governor's permission to buy Indian lands. Nor were the Assemblies inclined to limit their intervention to aiding the prerogative authority. Massachusetts, as early as 1722, shows Shute compelled to accept the advice of the Representatives as to his speech to the Iroquois, and in 1723 the House sent instructions to the Commissioners appointed to meet the Five Nations at Albany. Indian Commissioners were regularly appointed by the Assemblies in Pennsylvania and South Carolina, where in 1755 the Assembly insisted on the Governor and Council consulting with a number of their members on the negotiations with the Creek Indians.

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[1] Recruiting in America was provided for by 29 Geo. II, cc. 35 and 5 in addition to the ordinary Mutiny Acts. See also ch. xii, § 6.

[2] A local truce and exchange of prisoners was proposed between Dudley and Vaudreuil in 1705; Osgood, i. 417 ff. Oglethorpe made local agreements with the Spanish authorities at St. Augustine; Osgood, iii. 50.

[3] For Dudley's treaty with the eastern Indians, in which Councillors of Massachusetts and New Hampshire joined, see C.C. 1712–14, pp. 229–31. New York in 1726 concluded an important compact; Virginia at Albany in 1722 dictated terms to the Five Nations, with Burnet's permission, with Maryland and Pennsylvania it made terms at Lancaster in 1744, recognizing Iroquois supremacy over the minor tribes. See also ch. xii, § 7.

Intercolonial relations were conducted primarily through the Governor, and concerned a miscellaneous number of topics, military and Indian affairs, boundary questions, rendition of criminals, and so on. Boundary issues were often of the most serious kind, and it became as early as 1730 usual to entrust them to Commissioners from the Assemblies for consideration, in the hope of an amicable settlement which the Crown in Council could ratify. Demands for extradition[1] seem to have been comparatively rare; Sharpe in 1759 sought the return by Pennsylvania of some fugitives, but surrender in these cases seems not to have been a matter of course, though no legal difficulty appears to have been felt in handing over persons in this category.

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[1] Cf. A.P.C. vi. 239 (1736).

8. *Ecclesiastical Affairs*

The Church of England was the established Church of England, but it was not part of the common law which in English theory accompanied the settlers where they went that the law of the Church should go with them.[1] Hence in no sense was the Church ever established in New England, Pennsylvania and Delaware founded by a Quaker, or New Jersey which owed its early development in no small degree to that sect. Yet even in these colonies in a sense the royal supremacy existed as declared by statute in England. In 1725 when the Congregational ministers of Massachusetts desired to hold a synod they petitioned the General Court for leave so to act. The two houses would have agreed, but on reference to the Imperial government the ruling was laid down that the petition was improperly addressed, that it should have been made to the Governor alone, as the royal supremacy applied to Massachusetts, and accordingly no synod could assemble save with royal licence.[2] The reasoning may be doubted, but it is not certainly wrong. In Virginia, in Maryland under the Charter, in the two Carolinas and Georgia, in Nova Scotia and the West Indies, the Church may fairly be deemed to have been established and endowed. In New York it was afforded some aid. Without, however, regard to this distinction, it was customary to instruct the Governor to promote the due service of God throughout his government and the regular use of the Book of Common Prayer. The right to collate to benefices was given to him, but he must prefer no one who was not certified fit by the Bishop of London,[3] whose spiritual powers were to be supported by him. Anglican clergy should be provided with due maintenance, houses and glebes, and proper steps should be taken to remove those who proved unworthy, though the means were left vague. At the same time the grant of probate of wills and letters of administration and marriage licences was assigned to the Governor as Ordinary, thus excluding ecclesiastical jurisdiction in vital matters affecting the life of the people in general.

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[1] The Bishop of London in 1725 merely suggested that 6 Anne, c. 8 might be held to establish the Church, and this suggestion received no sanction from the Law Officers (Chalmers, *Opinions*, i. 4–14). The Acts of Charles II clearly did not apply. The Act of 1707 was relied on in 1761 to refuse incorporation of the Presbyterian Church in New York as contrary to the Coronation oath; A.P.C. iv. 760 f. Yet George III accepted the Quebec Act, 1774.

[2] Chalmers, *Opinions*, i. 11–14.

[3] Teachers from England were to be approved by the Bishop, and licensed by the Governor. The Georgia trustees disputed the right of the Bishop to license clergy there; Osgood, iii. 108 f.

As usual, legislation seriously lessened the Governor's powers. Virginia by Acts of 1642 and 1662 conferred the right of presentation on the vestries, empowering the Governor and Council to suspend, and the General Assembly to remove, ministers. In 1703 Northey A.G.[1] ruled that, if the vestries did not present within six months, the Governor could both collate and induct, but otherwise he could only induct, and an effort of Spotswood in 1719 to claim a general right to collate and induct as provided in his commission was clearly untenable. In fact the vestries preferred to keep their clergy in subjection by yearly contracts without presentment for induction which gave the incumbent life tenure, and in 1748, despite the objections of the Bishop of London, the period for presentation was extended to twelve months and the power of the vestries was confirmed. Such discipline as was enforced lay with the Governor and Council, as in the removal of Brunskill in 1760 for immoral conduct. The pay of the clergy was regulated by Acts which provided churches, glebes, and houses; fixed at 16,000 lb. of tobacco in 1696 and 1748, its commutation into cash at 2*d*. a lb. in 1758 gave rise to a serious constitutional issue as well as to the disallowance of the measure by the Crown as unjust.[2] In Maryland formal establishment of the Church was attempted by Acts of 1692, 1696, and 1700, all of which were disallowed for excessive rigour, but a compromise Act of 1702 was passed.[3] Under it power to present was given to the Governor, and, after 1715, was resumed by the Proprietor in accord with the charter; payment was made by a levy of 40 lb. of tobacco on each taxable inhabitant, and control over the clergy was vested in the Governor and Council. In South Carolina, as in Maryland, the system of parishes with vestries was adopted by an Act of 1716 replacing an earlier measure of 1704, disallowed by the proprietors under pressure from the House of Lords and the Queen, but the vestries in South Carolina were annually elected by

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[1] Chalmers, *Opinions*, i. 22 ff.

[2] A.P.C. iv. 420 f.

[3] A.P.C. iii. 382 f. The Toleration Act of 1649 was repealed in 1692.

Anglican freeholders, and were not open, as under Northey's advice was the case in Maryland, and clergy were elected by the Anglican inhabitants of each parish. The Act provided for public support of the Church by erecting churches, providing houses and glebes, and salaries for ministers. Some oversight was exercised by a commission appointed by law. In North Carolina formal establishment and endowment were provided for under early proprietorial laws of 1701, 1704—both disallowed later—and 1711, and again in 1715 and 1729, but without substantial result, as the province remained with practically no clergy. In 1755[1] an Act was passed which virtually gave the whole control to the vestries and entrusted discipline to a special Court; it was disallowed in 1759, and a more suitable Act passed in 1765[2] admitted the patronage of the Governor. In the West Indian Colonies, Georgia, and Nova Scotia the position of the Governor was also asserted, but difficulties were experienced in Barbados,[3] where doubt was felt as to the power of the Governor in Council to remove a criminous clerk, while an effort was made by an Act of 1719 to exclude all ecclesiastical jurisdiction, but modification was insisted on by the Board of Trade to acknowledge jurisdiction of the Bishop of London over ecclesiastical persons. Jamaica likewise respected the Bishop's intervention. In New York Fletcher in 1693 procured an Act to provide for a levy on all taxables in the City and County of New York, and Richmond, Westchester, and Queen's Counties for the support of six 'good and sufficient Protestant ministers', to be raised by vestrymen in co-operation with the country justices. The vestries enjoyed the right to select a minister for induction by the Governor, but the vagueness of the description long rendered legal dispute possible as to whether Anglican clergy alone could be chosen. In 1697 and 1704, however, special Acts created an undisputed establishment of Trinity Parish in New York with a vestry confined to Anglicans as opposed to the general vestry under the Act of 1693.

The system of Anglican churches was manifestly incomplete without a Bishop to grant ordination—saving the dangerous journey to England, to confirm, decide disputes between clergymen, churches, and parishes, consecrate churches, enforce discipline, and guide policy. But though Archbishop R. Tenison strongly pressed for action in 1707, and Anne all but yielded, the Hanoverian stagnation prevented action. In lieu the Bishop of London exercised a vague control, evidenced by instructions to the Governors, the Archbishop of Canterbury appearing only in the New York commission of 1686. Compton's successor Robinson (1713–23) was inactive, but Gibson (1723–48) endeavoured to make real his functions, and secured on 29 April 1728[1] a Commission under the Great Seal by virtue of the royal supremacy. It authorizes him to exercise ecclesiastical jurisdiction in the colonies by himself or his commissaries, to visit the churches, to cite incumbents, priests, and deacons, to inquire by sworn witnesses into their conduct and morals, and to punish by suspension or excommunicate. Commissaries had already been appointed by Compton, of whom Blair in Virginia (1689–1743) was the most successful. He secured the endowment of William and Mary College in 1693 with a seat in the Assembly, and maintained successfully the interests of the Church against the indifference of Andros and the claims of authority of Spotswood. Bray spent only a brief period in Maryland in 1700, but the foundation of the Society for the Propagation of the Gospel was largely his work, and it served the invaluable purpose of providing clergy and stipends for the colonial churches. Commissaries were freely appointed under Gibson, but the only formal trial,[2] that of Whitefield in 1740 in South Carolina, was quite abortive. Sherlock, Gibson's successor, disliked strongly the whole system, which deprived the Bishop of any real power of discipline, since appeal from the Commissary did not lie to him but to a special commission. He refused up to 1752 to exercise jurisdiction, and, though reluctantly he consented to perform certain functions, he refused absolutely the renewal of the commission of 1728, and commissaries ceased to be appointed save for Virginia. On the other hand he endeavoured, with the support of Secker of Oxford and Butler of Durham, to persuade the government to appoint a Bishop for the colonies, but Horatio Walpole and Newcastle refused to take this movement seriously. Their reluctance was not lessened by the attacks on Anglican views of Jonathan Mayhew in 1750, which were interpreted to denote that an appointment would raise a grave political issue. In fact, however, while their refusal to act hindered the development of the Church, their opponents used the idea of the establishment of a Bishopric as a political weapon with very considerable, if quite unjust, effect.[1]

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[1] A.P.C. iv. 408 f.

[2] A.P.C. v. 100; vi. 445 f. The Bishop doubted his power to confirm or disallow the Governor's suspension.

[3] A.P.C. iv. 653, 741 (1766); v. 305 f.; J.C.T.P. 1718–22, pp. 48 f., 287. Copied in St. Vincent in 1768.

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[1] A.P.C. iii. 88–92. Barbados objections were overruled. For instructions of 1686, 27 Oct., see C.C. 1685–8, no. 946.

[2] Osgood, iii. 114.

Toleration for other sects was not refused in the colonies which established the Church of England. Though the Toleration Act of 1689 was not extended to the colonies its principles were generally accepted; in Virginia in 1699 Protestant dissenters were excused from Church attendance, and in 1705 Quakers were allowed to regulate church affairs and affirm, though they remained liable to pay levies for the established church, as was also the case in Maryland and the Carolinas. Pennsylvania had no religious establishment. New York in 1691–3 guaranteed religious toleration to Protestants, but in 1707 Cornbury endeavoured to insist that he had the power to prevent any person preaching without his licence, and Mackemie, a Presbyterian clergyman, who had preached while on a visit was indicted; it was argued that the Elizabethan Acts of Supremacy and Uniformity applied to the province and that the accused had violated them, but the jury refused to convict,[2] doubtless persuaded by the argument that the Act of 1693 gave toleration as well as the Governor's instructions. Matters were less accommodating in the New England Colonies, where the Congregational Church was both established and endowed by Massachusetts and Connecticut. The Massachusetts Charter of 1691 gave liberty of conscience to all save Papists, but a series of Acts up to 1702 re-established the domination of the Congregational system; ministers must be provided by each town, to be selected by the majority of church members qualified to vote in town affairs, but supported by levies from all, while the General Court could step in and make provision if a town, like the Quaker strongholds of Dartmouth and Tiverton, resisted. Acts of 1706, 1715, and 1722–3 imposed heavy levies on these towns, whose assessors for disobedience were imprisoned, but on appeal to the Privy Council the Acts of 1722 and 1723 were disallowed.[1] Further progress was achieved in 1728 when Baptists and Quakers were relieved of poll taxes for orthodox clergy, an exemption extended in 1729 to taxes on real and personal estate. Finally Belcher in 1731 induced the passing of an Act, extended in 1734 to Baptists, giving exemption also from contribution to the building of churches. The Anglicans had as hard a fight. Shute as Governor sent futile orders to the magistrates at Marblehead and elsewhere not to levy rates on Anglicans for the support of dissenting ministers, and John Checkley of Boston[2] by his defence of the doctrine of episcopal succession challenged the established order. Indicted for libel, he urged that the Acts of Elizabeth, Charles II, and the Act of Union made the Church of England the established church in every colony. The jury threw on the Court of Assize the responsibility of deciding if the charge of libel was justified, and the Court inevitably held that it was and fined the accused. The Bishop of London, however, was now actively pressing the government to afford relief, and in 1727 the legislature provided for the payment to Anglican churches maintaining regular services of the dues of those in attendance. Further concession was inevitable, though Yorke and Talbot advised that in law the Acts establishing and endowing one special Church did not violate the Charter, and that in any case the matter must be fought in the Courts, as the Acts had ceased to be liable to disallowance. The Courts decided against the Anglicans, but an appeal was permitted by the King in Council. A decision, however, became unnecessary as in 1735 the same concessions as had been made to Quakers and Baptists were given to Anglicans. In Connecticut in 1727 a similar concession to that contained in the Massachusetts Act of that date was made to Anglicans, while in 1729 Quakers and Baptists were at least excused from paying rates for the established denomination. But dissenters remained in a more or less unfavourable position, while the split in the Church induced by the Great Awakening resulted in 1742 in an Act directed against itinerant preachers, one of the last persecuting statutes.

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[1] Van Tyne, *Causes of War of Indep.*, pp. 348 ff.; A.P.C. vi. 445 f.

[2] N.Y. Col. Docs. iv. 1186 ff.

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[1] A.P.C. iii. 58 f., 121, 156, 491 f.; J.C.T.P. 1723–8, pp. 56 f., 87.

[2] Osgood, iii. 135 ff.

Roman Catholics were outside the English Toleration Act and were unwelcome in the colonies. Virginia refused to allow them to bear arms, give evidence, or hold office unless they took oaths prescribed in Acts of 1699, 1748, and 1756. In Maryland they might not teach school; children on attaining majority must take the oaths on pain of being incapable of inheriting lands; in 1718 they were disfranchised and later had to pay double taxation, nor could they inherit lands. Northey A.G. also advised in 1705 that any bishop or priest for saying mass could be adjudged to perpetual imprisonment, while alien priests could be expelled. New York and Massachusetts re-enacted the provisions of 11 Will. III, c. 4[1] ordering the departure of Roman Catholic priests, and Rhode Island, which had no religious tests, from 1719 to 1783 denied political rights to Roman Catholics.

9. *The Legal and Political Liability of the Governor*

There was a tendency[2] in this period to treat the Governor as immune from suit in the colonial courts as was the King in England. It is true that in 1703 Northey[3] advised that Governors after the termination of their office might be arrested and prosecuted in the colonies by private persons for arrest and false imprisonment, but few instances of this occurred, and in the case of *Fabrigas* v. *Mostyn*,[4] which was an action by a native of Minorca, for trespass and false imprisonment on his forcible removal from the island by the Governor, Lord Mansfield declared that an action must lie there or he could be held liable nowhere else. A very limited remedy was applied by the Act of 1700 allowing punishment in England for wrongs committed in the colony; no American governor was punished under it, though reference is made to cases of Douglas of the Leewards in 1716 and Lowther of Barbados in 1720.[5] Civil actions in England were brought against Bellomont for illegal imprisonment and Phips for illegal interference with a Collector of

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[1] Northey held that this Act applied to the colonies (Chalmers, i. 4). For Antiguan legislation against Papists, 1716, see J.C.T.P. 1715–18, pp. 363–5.

[2] See L. Morris, 1735; A.P.C. iii. 486.

[3] N.Y. Col. Doc. iv. 1033. Nanfan the Lieutenant-Governor in New York was, however, thus prosecuted for his acts as Governor after Bellomont's death in 1701, and Day of Bermuda in 1708; A.P.C. vi. 78; ii. 339.

[4] 20 St. Tr. 81.

[5] Douglass, *Summary*, i. 217; A.P.C. ii. 652, 689 ff., 775–8, 786 f.

Customs.[1] But, as both Stanhope, Secretary of State in 1715, and Hamilton in the *Zenger* case[2] in 1735 insisted, these remedies were worthless owing to the distance and expense, as well as the impossibility of transporting evidence for a conviction.

It was therefore left to the Crown to enforce good conduct by recall, while specific offences like neglect of his duties under the Acts of trade, or the Act of 1750 as to iron and steel manufactures, might entail heavy fines and loss of office. The practice of taking bonds for due performance of duty originated with the Governors of proprietary governments. Penn adopted the same plan, especially in requiring Governors not to assent to certain bills under penalty if they did so, but the Assembly in 1760 indemnified the Governor for the forfeiture involved in his disobedience. There is no reason to suppose that any of the royal Governors was brought to book financially in this way.

If the Crown were to be induced to withdraw a Governor, it was necessary that it should be possible to expose his actions and publicity was invaluable to that end. But the Governor was dangerous to attack, for in the early days of the colonies especially strict legislation had penalized heavily any disrespect to the government. The Bayard trial and condemnation in 1702 illustrates the risk, for Bayard[3] was condemned to death for no more than asserting that the Assembly had procured an Act by paying the Governor, and that incompetent men had been put in places of trust, and similar criticisms of the outgoing Governor. Fortunately the incoming Governor reprieved him, and ultimately an Act reversed his attainder with Anne's approval. The law of libel also operated to terrify critics. In 1735 Cosby of New York used it to have J. P. Zenger prosecuted for publishing an attack on him by Lewis Morris, whom he had removed from office for deciding against him in an issue of salary, and who revenged himself by criticizing his course of action. Andrew Hamilton, the leading counsel of Pennsylvania, secured his acquittal by the jury, despite the ruling of the Court that it lay with it to decide whether a publication was libellous and falsity was quite unnecessary to constitute a libel. In consequence of this *cause célèbre* criticism was much freer, and a grand jury in Boston in 1768 refused to accept the Chief Justice's advice to find a true bill in respect of alleged libels on the Governor in the *Boston Gazette*. On the whole this publicity[1] was to the good, for the type of Governor sent out was not of so high a calibre as to be safely left uncriticized.

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[1] 20 St. Tr. 217 f., 232; Hutchinson, *Hist.* ii. 74 f. Cf. *Dutton* v. *Howell* (1693), Shower, *Cases in Parl.* (1740), pp. 24–35.

[2] 17 St. Tr. 675.

[3] 14 St. Tr. 471.

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[1] The first newspaper, the *Boston News Letter*, dates from 1704; others from 1719–40. The Court's statement of the law of libel was in accord with English law; see *Woodfall's* case (1770), 20 St. Tr. 895, 917 ff.; the jury's action was as in *Miller's* case (1770), ibid. 869. Cf. Glynn, *Parl. Hist.* xvi. 1211 ff.; 32 Geo. III, c. 60; *Penn's* case, 6 St. Tr. 651; *Bushel's* case, 999; *Bradford's* case (Pennsylvania), Channing, *Hist.* ii. 479–81.

IX. THE LEGISLATURE

1. *The Constitution of the Legislature*

IN this period the colonial legislatures had attained a definite form of constitution. The original idea of the joint session of Governor, Council, and representatives had given way to a separation of the houses as early as 1666 in Virginia; in Maryland it was abandoned formally in 1650 and, though for a brief period restored in 1660, that experiment was hastily abandoned. In New Hampshire the new form was rapidly adopted as also in the Carolinas. Rhode Island and Connecticut separated the houses in 1696 and 1698. The West Indies and new colonies, New York, Nova Scotia, and Georgia followed the regular model. In Pennsylvania, as has been seen, the Charter of Liberties destroyed the elective Council as a feature of legislative process and the Council which was nominated in lieu was never conceded legislative power by the Assembly.

The Council was the same body that aided the Governor in executive and judicial business, and no doubt originally the Governor sat and voted in it when in legislative session. Bellomont did so in Massachusetts, and the practice continued later, until in 1725 it was ruled by the Law Officers[1] that this was incorrect. The decision was not necessarily applicable to other colonies with nominated Councils, and might have been restricted to Massachusetts with its elected upper house. But the issue was raised in New York under Cosby, who was instructed that he was not to sit.[2] After his death, therefore, the new Governor refrained from presiding, and in New Jersey, then separated from New York, Lewis Morris, who had opposed the presence and policy of Cosby, promised the Council the right to sit by itself, an arrangement which Belcher would have gladly modified. Burrington in North Carolina insisted that the Governor always presided in the Council, but here again he was not allowed to determine the issue, and in South Carolina the Council objected to Glen sitting as unparliamentary, and only reluctantly allowed him to be present and not to vote. The rule thus came to be that the Council had its own President when it acted as a legislative body, and that, if the Lieutenant-Governor was a member of it, he was the President. The Governor's removal unquestionably was to him inconvenient in lessening his power to secure the overruling of proposals of the Assembly, though, on the other hand, it removed the appearance of the Council merely acting as his mouthpiece. The Council, however, was always too closely connected with the Governor to be accepted in the colony as an independent authority of weight comparable to the House of Lords; William Smith quite correctly recognized that the colonial legislatures had really failed entirely to reproduce the British system, for only one of the three elements had anything like its due weight.[1]

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[1] Chalmers, *Opinions*, i. 231; J.C.T.P. 1723–8, pp. 150, 189 (Montserrat).

[2] N.Y. Col. Docs. vi. 40 f. Barbados retained throughout the Governor's presence. Cf. A.P.C. iii. 492 f.

As has been seen,[2] the Council was denied by the lower house the right to amend money bills except in so far as in Massachusetts and South Carolina the elective Council succeeded from time to time in securing changes by tactful suggestions rather than controversial means. In Pennsylvania where the Council was denied legislative power of any kind, the Governor took its place as entitled to amend ordinary bills, but it was maintained by the Assembly that he might merely reject, not amend, money bills. This claim of control over finance was not made immediately on the creation of Assemblies; we find in Barbados the Council permitted in 1674–5 to make proposals and to confer with the lower house,[3] though there also the latter gradually asserted its superior power. In Jamaica the claim was suddenly advanced in 1703,[4] and the Council very justly pointed out that it was new, and that only a year before the Assembly had been willing to consider amendments as a matter of course. But the Assembly would not yield and the Council in the result could not make good its claims, despite the patronage of the Board of Trade, which in 1718–20 was insistent on recommending Governors to negative the claim of the Assemblies to the right of the Commons. In St. Kitts also there was strife with the inevitable result.

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[1] Maryland Assembly, 1739 (Osgood, iii. 18 f.); Lucas, *Hist. of Can.*, 1763–1812, p. 256. For a denial of the Council's status as a legislature by a South Carolina court in 1773 see A.P.C. vi. 564–7.

[2] See pp. 207–12 *ante*.

[3] Harlow, *Barbados*, pp. 219 f.; C.C. 1712–14, p. 208. Cf. a Montserrat discussion in 1725; J.C.T.P. 1723–8, p. 189.

[4] C.C. 1702–3, nos. 784, 818, 833, 882, 1217; Portland's Instructions, 1721, cl. 27.

2. *The Composition and Duration of the Assembly*

The Assembly was essentially a development from the meeting of freeholders or freemen of a corporation, and the franchise according to the Board of Trade should be granted to freeholders or other persons of assured yearly income. The terms laid down in the Massachusetts Charter of 1691, 40 shillings freehold on the English model or personal property £40, indicate adequately its point of view.[1] But the exact definition could be varied by the Governor under his commission, which was so general in terms that the decision of the recipients of the vote could be decided according to local conditions, provided always that the qualification was not definitely laid down by Act of the legislature. In point of fact,[2] by one or other of these means, the franchise was variously ordered from time to time; thus in Barbados it was restricted to the holders of 50 acres excluding mere workers, and Nevis deliberately denied it to merchants, though they had actually exercised it for a time. New Hampshire when set up for itself fixed the qualification at £50 freehold. In the main the terms granted were fairly democratic, but there were exclusions on ground of race, of property, of religion and good character, and of residence, while aliens were not eligible. It is estimated that in Virginia and Rhode Island about nine per cent. of the white population voted, in Pennsylvania eight, but in Massachusetts and Connecticut as low as two per cent.

The mode of election preferred by the Board of Trade was open voting in the English fashion, which, it asserted, when disapproving a Jamaica law introducing the ballot in 1753,[3] was the regular practice save in South Carolina, where the ballot had been introduced under the proprietary régime; Pennsylvania, however, was in like case.

The qualifications of members were regulated in the same way, in part by the Governor under his commission and instructions, and largely by Acts of the legislatures. On this issue, however, a substantial divergence appeared between the Imperial government and the colonies. The Governor found the presence of placemen most valuable as a means of controlling the Assembly, as long as he was left in control of any substantial number of offices. This was especially the case in Maryland, where the proprietor and Cecilius Calvert were active in seeking by the bestowal of petty offices to create a solid *bloc* in the lower house. In return in 1716 all ordinary-keepers and persons disqualified under British Acts were debarred from seats,[1] and in 1757 it was proposed, though vainly, to forbid any holder of proprietary office to sit and to impose a fine of £1,000 on any member accepting such office within six years after ceasing to be a member. In Virginia patronage was much used, with the result that in 1730 sheriffs were absolutely disqualified and other persons accepting office must stand for re-election, a provision repeated in 1762. In 1773 the Board of Trade accepted disqualification of sheriffs and inspectors of tobacco while in office, but demurred to two years' disqualification thereafter. Clarke's use of patronage in New York evoked the triennial bill, and after seeking to exclude all office-holders New York passed an Act in 1770 to keep out judges, who were often leaders of faction and excluded from the British Commons, but this was disallowed. South Carolina in 1745 attempted to deprive all office-holders of seats, but in 1748 this Act also failed to stand. The evil of patronage was denounced as early as 1708 in Massachusetts, and Hutchinson shows that Shirley and Pownall had no objection to its use, and there is evidence of the same problem in the West Indies. But the right was deemed too valuable to be surrendered by the Crown. Exclusion on grounds of religion affected chiefly Roman Catholics, who were specially indulged in Grenada; Quakers in Pennsylvania in 1756 avoided legislation by voluntarily refraining from candidature.

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[1] In 1759 in New Jersey freeholders in counties and householders in towns were given votes; in the south, freeholders predominated. In North Carolina the freeman franchise was changed to freeholder in 1735. Virginia in 1714 had a half-acre freehold franchise; C.C. 1712–14, pp. 70, 172, 278.

[2] McKinley, *The Suffrage Franchise in the English Colonies*, ch. xv. West in 1723 vainly denounced a Jamaica Act for taking away the vote on colour grounds only; Chalmers, ii. 112–14.

[3] A.P.C. iv. 217 f.

Not less important was the question of constituencies. It was clearly part of the prerogative of the Crown to establish the constituencies and to lay down the number of members to be selected, and the Governor normally issued writs to the Sheriffs directing the election of the appropriate number for each electoral district. But the Board of Trade did not object on principle to the passing of Acts to provide for representation, provided always that the effect was merely to authorize the issue of writs to duly qualified communities—counties or parishes or in New England towns—and not to forbid the issue of other writs. As early as 1739, however, we find the rule laid down in New Jersey that Acts increasing the membership should have a suspending clause.[1] The question of the prerogative right was bitterly fought out in New Hampshire between 1745 and 1752. As a result of a determination of the boundary with Massachusetts Wentworth in 1745 issued writs for six towns, but the Assembly would not permit the elected to vote for the Speaker. Wentworth had to accept the Speaker for the moment, but the Law Officers in 1747[2] clearly with justice upheld the Governor's right to secure a just extension of representation, and he was ordered to dissolve the legislature and call a new one. In it the deadlock was resumed, the Governor adjourning or proroguing the legislature until January 1752; no taxes were imposed, no salaries paid, no bills of credit could be redeemed, nor public accounts audited or offices opened, and deep discredit attached to the province. Ultimately the Crown won the contest, but later did not insist on acting by the prerogative in lieu of Act. In 1743 it was decided to instruct Massachusetts that the representation was becoming too unwieldy, overshadowing the Council, and that any bill to grant new townships representation must have a suspending clause. As the colony denied the right to require such clauses, no action was taken by it for some time, and when Danvers was given representation in 1757 the Act which had no suspending clause was disallowed in 1759, though the disallowance was not acted on. In 1761[3] the Board receded from its position, because it found that both by the Charter and by an Act duly confirmed the privilege of representation adhered normally to townships, and only suggested fresh legislation to alter this rule. In North Carolina[1] inextricable conflicts arose between the older counties with five representatives and the new with but two; finally in 1754 thirteen Acts were formally repealed, and the Governor was instructed to proceed by charters of incorporation allotting representation. The plan did not work well and he was allowed to assent to an Act for the creation of counties, but without rights of sending members, though in some cases efforts were made to elect without a writ being issued. In 1767 a general instruction forbade assent to any bill to increase or diminish numbers of members, to vary qualifications of electors, or electorates, or the duration of legislatures without suspending clauses. In the main distribution was not unfair, but the Germans and Scoto-Irish in western Pennsylvania though equal in numbers had but ten out of thirty-six seats as opposed to the Quakers and conservatives of the east; the Scoto-Irish in South Carolina were also sufferers, and New York was unfairly divided.

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[1] In 1722, 1734, and 1740 the lower house expelled office-holders by resolution. In 1753 a Jamaica Act to exclude was disallowed; A.P.C. iv. 222. Conviction of crime in England was no bar *per se*; Chalmers, i. 297 f. (Jamaica, 1755). In 1748 Jamaica was not allowed to increase the qualification from £300 income or £3,000 capital; A.P.C. iv. 49. Cf. Antigua, 1719; A.P.C. vi. 131.

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[1] A.P.C. v. 283 f. (1770); Act of 1768 allowed.

[2] A.P.C. iv. 30–3.

[3] A.P.C. iv. 475 f. Normally numbers were very low, not over thirty.

The duration of the legislature was a further subject of conflict between prerogative and legislation. The power to determine the length of existence of the legislature clearly belonged to the Crown in the absence of statute, and it might well suit it to avoid meeting the legislature, as in Virginia from 1715–18 and 1748–52, or keep in being as long as possible an obliging Assembly. In Virginia we find the legislature lasting from 1727–34 and 1742–7, while in New Hampshire the legislature in 1722 asked for dissolution, as it had been in existence for five years. In most cases, however, the frequent meeting of the Assembly was sufficiently assured by need of funds, and Virginia's experience is explained by the existence of permanent revenues on which officials could live. Pennsylvania and Massachusetts, like Connecticut and Rhode Island, enjoyed annual sessions at fixed dates, but other colonies save Barbados and St. Kitts could not attain this by law. South Carolina was exceptional; an Act for a triennial election was passed in 1721, for an annual election in 1745, but biennial elections were restored in 1747 as in proprietary days.[2] A North Carolina Act of 1715 to this effect was repealed in 1737.[3] The same fate was meted out to a New

[1] A.P.C. iv. 52–4, 188, 290, 477 f. A Montserrat Act of 1749 fixing the number at 12 and the duration as triennial was disallowed in 1752; iv. 101 f.

[2] Disallowed: A.P.C. iv. 49 f., 141.

[3] A.P.C. iii. 568. It was held invalid *per se*, Fane, 1737 (Chalmers, i. 356).

Jersey Act in 1731, and to a New York Act of 1737, both for triennial elections, and Jamaica equally failed in 1741.[1] It was not much consolation to New York to be allowed a septennial Act, which Virginia also enacted in 1762, providing for one session at least in three years. In 1767 a general prohibition to assent to such bills was issued. New Hampshire, however, had secured her desire by enacting a triennial Act in 1728 which was allowed to stand until 1752, mainly by oversight, and even then was not disallowed.[2]

Subject to these limited restrictions the Governor was authorized by his commission to adjourn, prorogue, and dissolve[3] all general Assemblies as he thought fit, and by a later instruction not to allow the Assembly to adjourn itself save from day to day. At first in Pennsylvania the Governor exercised the right to prorogue and dissolve, though the Charter provided for the Assembly sitting on its own adjournments, but this was gradually given up. In Massachusetts prorogation and dissolution within the limit of annual meetings as required by the Charter were practised, and the supplementary Charter of 1725 negatived the claim of the lower house to adjourn at pleasure.[4]

The right of prorogation enabled the Governor to prorogue to any place or time he thought fit, and to act when the Assembly was not in session, as convincingly argued by West in 1719.[5] The right was, naturally, disputed in Massachusetts, in 1729, where Burnet used it as a means of seeking to defeat the lower house on the salary issue, and in North Carolina, but vainly. The power enabled the Governor to allow hot tempers to cool down; more improperly, it was used by Belcher, according to the view in New Hampshire, to hamper the Assembly in seeking to secure a favourable outcome of the boundary dispute with Massachusetts by keeping it from meeting in due time to appeal from the decision of arbitrators. It was used, but with no ultimate results, in the great struggles of 1765–74 in efforts to prevent co-operation between the colonies; both the New York lower house in 1765 and that of Georgia in 1768 were thus restrained from action on the Stamp Act Congress and the Massachusetts Circular Letter. In the West Indies it was a constant weapon for harassing Assemblies and bringing them to what senses they might have. Dissolution, of course, served a like purpose and was often occasioned by disputes; Shute in 1720 dissolved his refractory lower house in order to obtain representatives who would 'fear God and honour the King', but his hopes were too sanguine.[1] Nor did Johnston of North Carolina mend much the manners of his Assembly by the like device. In 1756 Reynolds of Georgia was recalled to explain his action in dissolving the Assembly apparently to prevent investigation of charges against the Secretary of the Colony. In New Hampshire disagreement over supply bills caused repeated and very unpopular dissolutions by Belcher. In Jamaica a dispute over privilege resulted in refusals of supplies, and five Assemblies had been dissolved for recalcitrance before the Crown yielded in 1766. The revolutionary period proved clearly what was hardly ever dubious, that dissolutions were of little value in bending the will of the legislature; the electorate normally returned the same men, who came back with the fixed determination to defeat the Governor, relying as they could on the renewed expression of the popular pleasure. Nor in all likelihood had the Governor much power to manipulate elections, though Bellomont had fair success in doing so through changing the sheriffs of New York.

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[1] A.P.C. iii. 343 f., 617; iv. 89–91 (disallowed 1752).

[2] A.P.C. iv. 32 (disallowance suggested, as of Act of 1724; J.C.T.P. 1723–8, p. 413).

[3] For Popple's irregular action in Bermuda in 1748 see A.P.C. iv. 62 ff. For a discussion of the effect of the King's death on Assemblies see Chalmers, i. 230, 248, 303–43. It terminated its existence in royal colonies.

[4] A.P.C. iii. 102–4.

[5] Chalmers, *Opinions*, i. 231–7.

As usual where opposition to the executive dominated the interest of the lower houses, political organization of parties was only embryonic. In Massachusetts the issue of paper money revealed the fundamental divergence in economic interest of farmers and petty traders and of men of considerable estate and leading merchants who formed the nucleus of a royalist party which the Imperial government failed to cultivate. There was like divergence of view in Rhode Island. Faction was far more prominent in New York under its limited £40 freehold franchise and unequal distribution of seats. Feuds raged between such families as the Livingstons and De Lanceys. Strife was specially bitter between the Presbyterians and lawyers who supported the Livingstons, and the Anglicans, Lutherans, and the old Dutch congregations, with the representatives of town mercantile interests, who resented the Republican aspirations of the country members who were under New England influences.[1] In Pennsylvania the Quakers with the conservative Germans, aided by a high franchise and unfair allocation of seats, dominated politics until about 1750. By that time the Penns were Anglican, and the Anglicans and Presbyterians adopted the view of the duty of the province to take part in the French war, while the frontier districts resented their neglect in matters of defence and menaced revolt, ultimately forcing redistribution. In Virginia the aristocratic families controlled the Council and influenced the Assembly in the interest of the large planters; there, as in Maryland, the poorer and less educated classes gradually found champions in the lawyers, men like Henry, Lee, and Jefferson. The merchants of Charleston dominated South Carolina politics and the Council until about 1760–70, when planters and working men began to assert themselves. North Carolina witnessed in the War of the Regulation[2] a futile effort of the neglected settlers in the west to secure some attention to their needs, lack of representation preventing any peaceful means of securing redress from aristocratic office-holders.

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[1] Clinton's vain efforts in New York (1747–51) are described in A.P.C. vi. 295 ff. See Bull's sound view (12 Dec. 1769), vi. 475.

3. *The Privileges and Procedure of the Legislatures*

The Governor was required to administer to the Assembly members the usual oath of allegiance and fidelity, and until it was taken members might not sit. This provision, though a cause of friction as to matters of form between the two houses, was not intended to permit the Governor to exercise any control over the validity of elections. Cornbury, who refused to administer it to certain members whom his Council deemed improperly elected, was told that such matters should be left to the house itself, and Belcher in New Hampshire, who attempted to exercise his own judgement on the issue, desisted. The Assemblies were insistent on determining the propriety of elections through Committees of Privileges and Elections which took evidence and heard counsel if desired. Causes of rejection might be undue influence, bribery, intimidation, or wrong methods of holding an election, or disqualification as regards naturalization, race,[1] residence, property—on which many disputes arose in the West Indies—or religion. But in 1703 Jamaica persisted in refusing to admit on re-election members expelled for alleged disrespect to the Speaker; this, however, was not normally done, expulsion being deemed no necessary bar to re-election.

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[1] Becker, *Political Parties in the Province of New York*, pp. 18 f.

[2] Bassett, *Am. Hist. Ass. Rep.* 1894, pp. 141–212. The Regulators would have aided the royal cause in 1776, had they been better organized.

The Assembly elected its Speaker,[2] and the confirmation by the Governor, which was regular in imitation of British usage, was usually formal. But the right to reject was asserted by Dudley in Massachusetts in 1705, exercised by Shute in 1720, and enforced by the supplementary Charter of 1725; Wentworth also employed it with effect in New Hampshire in 1749–52, though Cornbury in 1707 abandoned the effort. The clerk[3] and the sergeant-at-arms were normally appointed by the Governor, despite the objections of the Assembly; Massachusetts and North Carolina were exceptions. Impartiality was not normal in the Speaker's attitude, Randolph of Virginia in 1734 being the outstanding exception; but he usually voted only to break a tie. He issued writs for examinations of witnesses and others and for carrying out commitments by the Assembly. Ceremonial procedure was controlled by him, and grew in complexity with the importance of the Assemblies, whose proceedings became, after the middle of the eighteenth century, open to the public on normal occasions, though as late as 1773 Pennsylvania debated in secret.

The Speaker early claimed the privileges of the House of Commons; it is recorded of Jamaica in 1677, shortly after in Virginia, in New York in 1691, and in Massachusetts in 1695, and the practice was common form, though Barbados, which started on lines of its own, was always backward in asserting privileges. They included freedom of speech; freedom from arrest for members and servants[4] save for treason, felony, or breach of the peace; freedom of access to the Governor; and favourable construction on the acts of the house, while the Speaker often asked that his errors be not imputed to that body. But, though asked for formally, the privileges were deemed inherent as ancient rights and privileges and undoubted as insisted on by the Virginian Speaker in 1736. The matter was put at the highest in Jamaica, where the Governor in 1716 only granted the privileges subject to his instructions. In 1764, as the Chancellor discharged under Habeas Corpus two persons committed by the Assembly, a deadlock ensued; the Assembly declared that its privileges were part of the *lex Parliamenti*, which was a part of the common law of England, which was declared to be in force in the island, and no instructions of the King or ministers could take away the right to commit. The government in this matter yielded, and the record in Chancery was expunged.[1] It was the same colony which in 1754 found the Assembly declaring that it would vacate any writ issued without its request for an election to fill a vacancy. The powers exercised over any offences against the dignity of the Assembly were wide: a rash clergyman, who declared he would deny sacrament to any one who voted to pay ministers' salaries in Virginia in money, had to apologize and pay fees, and fines were freely imposed. Imprisonment was possible: the naval officer at York River in Virginia was confined on bread and water, a Councillor in 1748 was forced to apologize for scandalous reproaches to the house; in Pennsylvania in 1757[2] the pamphlet of Moore, a justice of the peace, was ordered to be burnt, and he was sent to gaol. The Assembly was no less stern with its own members, who were subject to censure, fine, imprisonment, or expulsion for offences such as absence without leave—a common fact in the West Indies, immorality, irreverence, drunkenness, disobedience to orders, sedition, or contempt. As no judicial redress could be obtained, and as no appeal to the King was allowed,[3] as the provost of Philadelphia College found when he tried to aid Moore, the power to commit was unquestionably capable of abuse.

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[1] New York in 1737 decided to exclude Jewish votes.

[2] For the duration of the legislature, not for 3 years as in Bermuda; A.P.C. iv. 306 f.

[3] See A.P.C. iv. 230 (Bermuda, 1754).

[4] Disapproved by the Crown, A.P.C. vi. 401 (1765), but conceded in 1766; ibid. iv. 712 f.

The mode of procedure was normally based on the British, with three readings, and standing committees. Bills might be initiated by the Governor, the Council, the Speaker, a committee, or an individual, but the latter two plans were normal, and the Council could not initiate money bills. It was the custom to read in full and to reject at any reading; in North Carolina alone was the curious plan adopted of sending a bill to the Council for concurrence after each reading. Adjustment between the two houses might be effected by conferences; if not, the bill dropped. Massachusetts seldom used standing committees; a committee of the whole there was employed as a means of secrecy against the Governor as in Virginia and Georgia; in North Carolina it, however, did much that elsewhere belonged to standing committees; in Pennsylvania it was seldom needed and never in Barbados, which, on the other hand, was fond of joint committees with the Council, especially for the control of the agent. Connecticut and Rhode Island stood apart, for they had no standing committees, no formal readings, no dissolutions, but only under their Charters adjournments; but even they had Speakers. The Crown claimed the right to determine the quorum.[1] Payment was made save in Barbados, South Carolina, and Georgia; in New York it induced needless length of sessions in Hunter's time.

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[1] A.P.C. vi. 400–2.

[2] A.P.C. iv. 375–85; the Council ruled that a contempt could only be against the Assembly in being.

[3] For St. Kitts action in 1769 see A.P.C. v. 277–9 (1772).

The Councils claimed and sometimes exercised like privileges of punishing contempts, especially in Jamaica but also in the continental colonies.

4. *The Governor's Control over Legislation*

In this period any attempt by the Crown to control legislative initiative had disappeared, and the function of the Governor was confined in this regard to the right by speech or message to the Assembly to urge on their consideration the passing of laws. To submit drafts especially on money matters was resented, as Wentworth found in New Hampshire, and did not facilitate business. Accordingly, it was customary for the Governor to address the Assembly at the beginning of each session, remarking on the state of the province and any external matters affecting it such as Indian or French wars, and then urge legislation, including a supply bill. He was instructed to procure all sorts of laws, including the promotion of education, the humane treatment of servants and slaves, the enforcement of the marriage law of England, the punishment of immorality and blasphemy, and the enforcement of military discipline in peace time, as martial law could not then be used. Very little attention was ever paid to these allocutions, which have survived in the pious advice given by Presidents and State Governors to their legislatures.

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[1] e.g. Barbados in 1704–5 (A.P.C. ii. 477–80; vi. 30 f.), where the Assembly sought to fix it as 15 out of 22; in Bermuda in 1755 it was fixed at 15 against 17 of the Assembly; A.P.C. iv. 306.

On the other hand, the Governor[1] had the essential power of assent or refusing assent to any bill submitted. The power formally to adopt neither course, but to reserve, was a later device which was hit on as a means of saving the Governor from a decision which might prove inconvenient. If, for instance, he refused to assent to a bill, and the Board of Trade later disapproved his action, the bill was none the less lost, so that it was deemed advisable to allow of the Governor refusing to accept responsibility in either sense. A certain approach to this position was the rule that the Governor might assent to certain classes of bills, if they contained suspending clauses, which prevented their taking effect unless confirmed by the King in Council. This was a very convenient practice enabling bills to be ratified, if they proved innocuous, but it met with strenuous objections, especially in Massachusetts, where suspending clauses were absolutely repudiated as contrary to the right of legislation under the Charter. Pennsylvania was as emphatic: the Assembly asserted in 1756 that 'the deputy Governor has, or ought to have, full power to give his assent to all such bills as we have an undoubted right to offer'. The whole principle of instructions as to assent was assailed generally. In 1757 Parliament was induced to pass a resolution in which it dealt with a number of Jamaican claims,[2] including the objection to any giving of royal instructions as to assent, requiring that assent should be withheld from bills affecting the prerogative or the trade of Great Britain unless a suspending clause were inserted. The legal right of the Crown was clearly indisputable, but it is easy to understand that its exercise was resented.

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[1] When J. Jencks as Governor sought to veto a Rhode Island paper money bill in 1731, Yorke and Talbot ruled that he had no power of veto; Osgood, iii. 259 f.

[2] *Commons Journals*, xxvii. 910 f. Still maintained in 1762; A.P.C. vi. 350 f., cf. 324.

The instructions as to bills grew steadily in complexity and length as new occasions for passing on measures arose, for it was the custom to incorporate these new rules originally issued as distinct instructions in the next revision of the instructions for each colony. The instructions to Bernard in New Jersey[1] in 1758 are already voluminous. He is not to assent to bills of less than two years' duration except in specified cases; to bills to re-enact laws once refused sanction except with express authority; or bills repealing laws in force whether confirmed or not, unless there is a suspending clause. Nor may he assent to bills of 'an unusual and extraordinary nature and importance wherein our prerogative or the property of our subjects may be prejudiced or the trade and shipping of this Kingdom any ways affected', unless the draft has been approved or a suspending clause is inserted. This is supplemented, under rules of 1732, added to those of 1717 and 1720, by express orders not to assent to any bill differentiating in favour of natives or inhabitants of the province, or imposing taxation on British shipping or British products and manufactures. This precise rule is stated to be laid down at the request of merchants of London,[2] and the next (1731) is ascribed to the needs of the African Company,[3] forbidding as it does the levying of import duties on negroes or exportation duties on them unless sold in the province and kept there for a year; it was also provided that no duties should be laid on felons in contradiction to the policy enunciated in the Act 4 Geo. I, c. 11, for their transportation. The assent to laws creating bills of credit must be withheld if no suspending clause was inserted,[4] and a similar rule applied to any grants of money to the Governor, any Councillor or other person than the King. No law was to be passed diminishing the revenue without royal assent, and none that made money raised exempt from account to the Treasury and audit by the Auditor-General. Private Acts must contain a saving of the rights of the Crown and other persons, must have a suspending clause[5] and be accompanied by a certificate of due publication in the parish for three weeks before it was applied for. Temporary Acts must be those only which would have their effect and expire in the time limited; excise of wines and liquors must be for a whole year, and all other laws for the support of the government should be indefinite and without limitation. Other restrictions were progressively added after 1763, when Imperial control intensified; thus in 1767 orders were given not to assent to any bill affecting the qualifications of electors or electorate, providing for constituencies, or changing the duration of Parliament, and in 1769 it was forbidden to assent to lotteries, or in 1771 to Acts attacking property of absentees. In 1773 instructions were given not to assent to bills for divorce, for naturalization, or for the confirmation of land titles derived through unnaturalized aliens, who under English law were incapable of holding land.[1] In other cases instructions were given demanding legislation in certain forms, but not absolutely forbidding assent.

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[1] Greene, *Prov. Gov.*, pp. 237 ff.

[2] A.P.C. iii. 348. For 1717 cf. J.C.T.P. 1715–18, p. 263.

[3] A.P.C. iii. 161 f.

[4] Modified later in view of war needs; A.P.C. iv. 362 f., 372–4. First laid down in 1740, iii. 677.

[5] A.P.C. iii. 42 (1723).

The instruction most often violated was that of 1716 and 1734 forbidding repeal of Acts already passed; Massachusetts and Virginia[2] protested against it as contrary to English usage, but the Board did not yield. Restraints on paper money from 1720 were often neglected; Georgia, after inserting a suspending clause, proceeded to act on the law as if operative. Massachusetts, though refusing to insert suspending clauses, worded one or two Acts so as in effect to secure that operation was suspended until the royal pleasure was known, and obtained consent in advance to a bankruptcy Act in 1760 and a lottery for Harvard in 1765, and the repeal of a bounty on killing crows in 1744.[3] Pennsylvania was as obstinate as to suspending clauses as Massachusetts, and as successful in avoiding them. The vagueness of the rule as to Acts affecting the prerogative afforded Governors an opportunity of avoiding quarrels by assent, while, on the other hand, the Board censured them on the strength of the clause.

Even when Governors were anxious to keep faith, they might be coerced into disobedience. Tacking was a frequent device,[4] though contrary to the rule that Acts should deal only with one main topic; North Carolina in 1759 provided in the supply bill for a London agent, and in 1763 Maryland limited official fees in a tobacco inspection Act. Or assent to a forbidden measure was the condition of passing others: Hunter in 1715 obtained his five-years' supply bill by assent to a naturalization Act, and in 1741 the Assembly refused supply until other bills were assented to, a device adopted in Massachusetts as regards the Governor's salary bill. In 1759 New Hampshire offered to settle salaries on the judiciary if the Governor agreed to divide the country into three counties, and next year North Carolina withheld supply until other bills were accepted. In 1745 Wentworth, a fairly strong Governor, had to agree to bills of credit, on the understanding that the agent of the province would plead for him with the Imperial government,[1] and in both Carolinas disobedience on this head was justified by the fact that only thus could supply be obtained.[2]

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[1] A.P.C. v. 188, 283 f., 321, 552.

[2] A.P.C. iv. 132 ff., 174 f. (1752–3).

[3] Russell, *Am. Col. Leg.*, p. 214.

[4] For a deadlock in Jamaica in 1769–70 between Council and Assembly see A.P.C. vi. 477, 486–91.

The assent of the Governor, of course, was not decisive, for disallowance by the Crown was possible, and in fact not rare.[3]

Where no independent legislative power was left to the Governor he was allowed in practice to issue ordinances.[4] Those respecting the regulation of fees and the creation of courts stand in a distinct capacity; they were exercises of the executive and judicial prerogatives of the Crown and not legislative orders. That in New Hampshire in 1717 regulating ferriage is a relic of the prerogative power of the Crown to grant ferries. Other measures express powers legitimately exercised in time of stress as regards foreign or Indian attack. Thus in 1721 the Governor of Massachusetts ordered the frontiersmen to remain at their estates and keep possession of the country, while the New Hampshire Council on Dudley's direction ordered the registration of Frenchmen. North Carolina thus regulated the sale of liquor to Indians and Virginia trade with the Indian tribes, both matters of the royal prerogative to deal with Indian affairs. Virginia also regulated settlements in time of stress. Other ordinances were essentially merely enforce-ments of statute law or of treaties, which were supposed at this time to afford authority for a good deal of executive orders at any rate of a minor type.

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[1] A.P.C. iv. 94–6.

[2] A.P.C. iv. 211–13, 276, 414–16, 624, 630, 636.

[3] See ch. xii, § 1.

[4] Greene, *Prov. Gov.*, p. 160. He acted with the Council. For the older ordinance power see pp. 40, 42, 89, 125, 128 *ante*.

5. *The Extent of Legislative Authority*

The power to make laws not repugnant to the laws and statutes of England was an authority which in this period was given a wide extension. In the case of the seventeenth-century grants the power to deal with persons *en route* to or from the plantation had been included, but this power was not conceded to the royal Governors and appears to have been left in abeyance even in Maryland, where the Charter right was definite. It conflicted, it is plain, with the growing view that control of British shipping rested with the Imperial Parliament, and the attitude of the Attorney-General in 1703 towards the attempt of Rhode Island to create an Admiralty Court under its legislative power is a clear indication of the limited extent of jurisdiction which was held normally to be conveyed by the patents.[1] Hence the way was being prepared for the doctrine which predominated in the nineteenth century of the territorial limitation of colonial legislation.

No claim could, of course, be made for the possession by the colonies of rights incompatible with their dependence on the United Kingdom from which they derived their legislative authority. When such claims were advanced in the sense of denying the sovereign right of Parliament to impose taxation, the powers of Parliament were to be asserted in absolute terms, and the revolutionary epoch was to begin.

But the issue of repugnancy presented obvious and insoluble difficulties, as has been seen. The most unfortunate view of the powers of the legislatures is conveniently presented in an opinion of W. Rawlin,[2] Attorney-General of Barbados, on an Act of that island for the purpose of replacing an earlier Act dealing with the creation of credit for persons possessing real estate. Rawlin contended that the legislative authority 'cannot by a law alter the common law of England and the settled course of proceedings thereon; they cannot change the common securities of the Kingdom. They cannot enact anything against her Majesty's prerogative. They cannot take away by any authority they can establish any authority vested in the Governor by her Majesty's commission, with many other things too many to be here enumerated, and they cannot pretend to have an equal power with the Parliament of England'. He applied further to all colonial laws the maxim of Coke that 'an Act of Parliament that is against common right or reason or is repugnant or is impossible in itself is void'. The Barbados Act he condemned because it disseised men of their freehold without trial contrary to the law of England. It is significant that this sweeping condemnation was not shared by Northey A.G.,[1] who reported that he had no objection in law to an amending Act, but the points raised by Rawlin are not dealt with. His reliance on Coke's dictum as to the invalidity of laws against common right has an interesting precedent in the judgement of Symonds, a Massachusetts magistrate, in *Giddings* v. *Brown*,[2] when he ruled that a town could not place a levy on a householder to provide a house for a minister, as this was an interference with the right of property given by the law of God and nature to man. Otis was to repeat it in the controversy on writs of assistance, but even then it was not to convince the Massachusetts court.

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[1] A.P.C. ii. 457.

[2] Chalmers, *Opinions*, ii. 31.

But there was a class of cases where better authority than Rawlin's could be found for the doctrine of invalidity on the score of repugnancy, as opposed to mere suitability for disallowance. The most famous of these is the judgement of the Privy Council in *Winthrop* v. *Lechmere*[3] enforced by Order in Council of 15 February 1728 declaring invalid the Connecticut intestacy law of 1699 which abolished primogeniture in intestate succession and gave only a double portion of real and personal property to the eldest son. No power to disallow rested with the Crown under the Charter and the declaration rested, therefore, merely on the doctrine that the Act violated the Charter by its departure from the rule that legislation must be in accord with English law, interpreted to include common law. It must, however, be noted that in the Massachusetts case of *Phillips* v. *Savage*[4] in 1738 the Massachusetts Act of 1692, which inspired that of Connecticut, was upheld on the ground that it had been confirmed by the King, a doctrine which, of course, would

[1] Chalmers, ii. 38 ff. (23 Dec. 1717).

[2] *Hutchinson Papers*, ii. 1.

[3] A.P.C. iii. 149.

[4] Ibid. iii, no. 322.

not be accepted by courts at the present time as validating a measure *per se* illegal. Connecticut had deeply resented the ruling in *Winthrop* v. *Lechmere*, and would have asked for an Imperial Act to validate her intestacy law but for Francis Fane's suggestion that in such an Act opportunity should be taken to remodel the Charter on the Massachusetts basis. In 1742, however, in the appeal in *Clark* v. *Tousey*[1] from the New Haven County Probate Court, which applied the colonial rule to an estate, the Connecticut government provided £500 for costs; it was argued that the common law had never been introduced by local or Imperial Act—the claim that English statutes were confined within the four seas was prudently dropped—and that, therefore, there was no repugnancy in the Act of 1699. The appeal was dismissed in 1745, thus establishing the validity of the intestacy law, but on what grounds we do not know; possibly, as Yorke hinted when deciding *Phillips* v. *Savage*, Winthrop's victory was due to superior legal talent rather than the merits. The principle, however, of judicial cancellation of an Act was not affected; we find it debated and the question whether repugnancy extends to the common law or statute also by B. Whitaker in 1743[2] in South Carolina, while the precedent of *Winthrop*'s case was duly adduced in *Camm* v. *Hansford* in 1765[3] and was soon to become a fundamental maxim of the United States constitutional law.

We have also cases in which the disallowance of Acts took place by Order in Council on the basis that they were void, though there was no power of disallowance otherwise vested in the Crown. On 10 June 1706 an Order in Council[4] was issued on a representation of the Board of Trade, based on an address of the House of Lords fortified by the opinion of Northey A.G. and Harcourt S.G., declaring null and void two Carolina Acts, one for the establishment of religious worship, the other requiring members of Assembly to conform to the Anglican Church, on the ground that they 'are not consonant to reason and repugnant to the laws of England, and are therefore not warranted by the Charters of 1663 and 1665, but were made without any sufficient power or authority derived from the Crown, and therefore do not bind or oblige the inhabitants of the colony'. On 14 May 1718 an Order in Council[1] provided for instructions to the proprietors of Carolina to disallow an Act imposing 10 per cent. import duty on British manufactures, the Solicitor-General having reported that the law was not consonant to reason or agreeable to the laws of Britain, so that the Charter power of making laws had been exceeded. This Order, however, expressly recites that the law would be operative until repealed, and, of course, at this time no local court could have been expected to declare an Act invalid on the score of repugnancy. On 3 June 1747 the Law Officers[2] reported on a North Carolina Act of 1715 that the part which 'postpones execution on judgments for foreign debts in the manner therein provided is contrary to reason, inconsistent with the laws and greatly prejudicial to the interests of this kingdom, and therefore unwarranted by the Charter and consequently void, and we are of opinion that his Majesty may declare the same to be so and his royal disallowance thereof'. The Rhode Island Admiralty Act was declared null in 1704 as contrary to the powers given by the Charter,[3] and on 11 October 1705 a Connecticut Act against heretics was repealed and declared null and void,[4] 'it being contrary to the liberty of conscience, indulged to dissenters by the laws of England, as likewise to the Charter granted to that colony'. In the case of Massachusetts violation of Charter provisions was adduced for disallowance of an Act of 1693–4 regulating Chancery as impairing the right of appeal,[5] and of one empowering the inhabitants of Rochester to regulate the taking of fish as contrary to the freedom of fishery,[6] while disallowance of Acts of 1722–3 imposing taxes on Dartmouth and Tiverton for the maintenance of Presbyterian ministers was doubtless motived by the rule of religious toleration, these towns being Quaker strongholds.[7] Breach of the Charter by repugnance to English law was roundly asserted in an Order in Council of 26 May 1719[8] which condemned an Act of 1718 permitting, illegally, direct importation of wines from Europe, taxed double imports from Great Britain, did not require the use of English shipping, and imposed dues on English shipping which were not imposed on colonial ships; if the Act had been re-enacted before the disapproval was known, the Governor was not to allow it to be put in force, an instruction implying that *ipso facto* the repugnance rendered the Act null and void. In 1767 a delicate question arose on the Massachusetts Act of 6 December 1766 to compensate the sufferers in the Stamp Act riots, for a free and general pardon for the rioters was included. The Act was disallowed,[1] on the score that no pardon should have been given without royal approval in advance, 'without prejudice to the consideration of any question touching the nullity of the Act . . . *ab initio*, whenever the same may judicially come into question'. The issue clearly was how far the Act could be said to be repugnant to the Governor's powers of pardon under the Charter, and it is obvious that the question was a very difficult one. In the case of Pennsylvania interest attaches to an Order in Council of 31 August 1699[2] declaring null and void from the making thereof an Act for preventing frauds and regulating abuses in trade, and also all other Acts which had been or should be made contrary to the known laws and statutes of the Kingdom; this amounts to a reaffirmation of the provisions of the Navigation Act of 1696 and the Charter, making it clear, however, that repugnance should be deemed to make void as well as justify disallowance.

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[1] A.P.C. iii. 580 f.

[2] Osgood, iv. 136.

[3] Washburne, *Adm. of Justice*, p. 188. Possibility of judicial action was recognized by W. Thomson, 5 April 1718 (Chalmers, ii. 292 f.), and by Yorke and Talbot in 1730 (Osgood, iii. 139).

[4] A.P.C. ii. 506. Cf. Acts of 1696; A.P.C. iii. 396 (1734).

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[1] A.P.C. ii. 740.

[2] Chalmers, *Opinions*, ii. 62. Cf. A.P.C. vi. 66 (1708).

[3] A.P.C. ii. 457.

[4] Ibid. ii. 832. So Yorke and Talbot, 1 Aug. 1730 (Chalmers i. 553 f.).

[5] C.C. 1696–7, no. 484.

[6] A.P.C. v. 395 (1774).

[7] Ibid. iii. 58 f.; cf. 491.

[8] Ibid. ii. 759 f.

These are all cases of colonies with Charters; how far was repugnancy deemed to void Acts passed under the authority to legislate in the commissions of the Governors? Where repugnancy to the common law was concerned, we have no proof that Acts were held actually void. Acts of North Carolina[3] against crimes and rioting were denounced as 'contrary to the spirit and principle of the British laws' and 'irreconcilable to the principles of the constitution', but, though disallowed, it is not said that they were void *per se*. It was different where repugnance to statute law applicable to the colony was concerned; the doctrine of invalidity was expressly laid down in the Act of 1696, and the only question was whether there was repugnance. A Jamaica Act of 1759 prohibiting the importation of sugar, rum, and molasses was ruled void[1] as contrary to the Molasses Act of 1733 which provided for importation on payment of duties, and Murray on 6 May 1755[2] advised that a Maryland Act imposing a tax of 40*s*. on the importation of convicts was invalid as contrary to the Imperial Acts authorizing transportation, and argued that Acts to tax or prohibit British imports were *ipso facto* void, perhaps an extreme view.[3] Disallowance of Acts contrary to Imperial legislation, such as Admiralty jurisdiction, powers of customs officers, rates of foreign coinage, or taxes on British trade and shipping or naturalization, was frequent. The question of the power of a colonial legislature to legislate as to pardons was evidently doubted by the Law Officers in 1749 in connexion with a New Jersey Act to pardon rioters in 1748.[4]

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[1] A.P.C. v. 87.

[2] Ibid. v. 88.

[3] Ibid. v. 38, 336–8.

A very important point arose on the validity of Acts passed by a Governor in violation of instructions. We find an opinion of Raymond, 16 September 1723,[5] holding that violation of instructions invalidated a New Jersey Act as to representation, but the Board of Trade was clearly not of this opinion. The issue was raised as regards the Virginia Act of 1758 valuing ministers' salaries at the rate of 2*d*. a pound for tobacco. An Act of 1748, duly confirmed in 1751, had fixed the salaries in tobacco; such an Act under the instructions must not be assented to without a suspending clause; was, therefore, the Act a mere nullity? The Privy Council which disallowed the Act had before it the issue of declaring it null and void *ex initio*, but Wedderburn[6] seems to have held that disallowance should not be attempted in this form, and, though disallowed, the Act had in fact operated for the year as provided therein. The clergy, therefore, could obtain redress only if they could prove that the Act was void in itself, and before the Virginia Court it was urged that it was a mere nullity because it had been assented to contrary to instructions and also because it was contrary to the principle of justice. The claimants lost by five to four votes in the local Court, and on appeal[7] on 3 December 1765 the case was dismissed—

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[1] A.P.C. iv. 518.

[2] Chalmers, *Opinions*, i. 344–8; 4 Geo. I, c. 11; 6 Geo. I, c. 23. Cf. Pratt A.G., ibid. i. 264 f.

[3] It was held by Thomson S.G., 5 April 1718, that a Carolina Act imposing a ten per cent. tax on British imports was contrary to reason and void *per se*.

[4] A.P.C. v. 88.

[5] Chalmers, *Opinions*, i. 269.

[6] Osgood, iii. 479 f.

[7] *Camm* v. *Hansford*, A.P.C. iv. 699.

doubtless in view of the Stamp Act agitation—on the technicality that the claim should not have been framed as an action of trespass against the collectors of the tobacco levy but as an action of debt. Probably the Court would have been unable to rule that neglect of instructions invalidated Acts duly assented to, but did not desire to assert so inconvenient a doctrine.

Save Rawlin and the exceptional case of pardon, there seems to have been no disposition to doubt the power of legislatures to limit the prerogative powers ascribed to Governors by their commissions, though, on grounds of expediency, such Acts, when they interfered with his financial duties, or power of appointment, or military control, or the duration or constitution of the legislature, the franchise, or qualifications or disabilities of members, were often disallowed. Henley A.G. and Yorke S.G. on 18 May 1757[1] frankly advised that circuit courts could only be established in Jamaica by local or Imperial Act in view of the existing local Acts fixing the Supreme Court at St. Iago de la Vega, and legislation to regulate courts was absolutely normal. But the power to legislate could not, of course, be carried to an extent inconsistent with the purpose of the legislature; thus a West Florida Act of 1769, which provided for the settlement of the western area, was disallowed because it virtually amounted to an effort to create a new province, thus exceeding the legislative competence of the colony.[2] Some prerogatives such as that of appointing fairs were rather jealously preserved from invasion by disallowance, which was the fate of a Virginia Act of 1767.[3]

It was recognized that the treaty prerogative did not suffice to alter the law of the colonies, and therefore Imperial or local legislation was necessary to change that law, so that the King could not by making a treaty give himself or his officers any powers not already lawfully his or theirs.[4]

In not a few cases the Board of Trade and its legal advisers were willing to overlook issues of repugnancy where expedience counselled acceptance of legislation, acting probably on the doctrine of *Phillips* v. *Savage* that an Act might, though *per se* invalid, be remedied by royal confirmation. This was notably the case in the long controversy over Pennsylvanian attempts to enforce affirmations by Quakers in lieu of oaths, which was met by repeated if futile disallowances of acts which were promptly re-enacted. In 1714 the Imperial Act of 1696[1] which permitted affirmations but not for jury service, governmental office, and criminal evidence, was extended to the colonies, so that an Act of 1715 giving a general right to affirm was plainly void in law. Gookin quite legally declared that all courts must be invalid whose officers could not take or administer an oath, and the administration of justice ceased. None the less Keith, his successor, in 1718 accepted an Act allowing judges, jurors, and witnesses in all cases, criminal and civil, to qualify by affirmation or oath as they preferred, and the province urged that repugnancy should not be strained to forbid a further indulgence to a Quaker colony, and that in any case an Act remained valid until disallowance. West did not homologate this doctrine, but advised acceptance in the interests of the administration of justice. In 1722 further concession was made by Imperial Act, of which advantage was taken in a Pennsylvanian Act of 1724, confirmed in 1725. Similarly in 1772[2] the Board allowed to stand two Acts, one punishing the offence of counterfeiting money outside the province, and one regulating the navigation of the Delaware, despite their extra-territorial operation, on grounds of convenience, though an Act of 1773, imposing very savage penalties on persons injuring the lighthouse at Cape Henlopen, was disallowed as creating a crime and assuming a jurisdiction outside the limits of the province.

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[1] Chalmers, *Opinions*, ii. 138. Cf. on representation, i. 271–95; Antigua Act as to chancery, A.P.C. iii. 324 (1731).

[2] A.P.C. v. 286.

[3] Ibid. v. 163. For permission to legislate on land grants despite a royal instruction in Virginia in 1711 see A.P.C. ii. 642 f.; C.C. 1711–12, pp. 85–8.

[4] Yorke and Talbot, 3 June 1728 (Chalmers, ii. 342), on the treaty of 1686 with France.

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[1] 7 & 8 Will. III, c. 34; 1 Geo. I, c. 6; 8 Geo. I, c. 6.

[2] A.P.C. vi. 509; v. 399.

X. THE JUDICIARY

1. *The Courts of Justice*

THE creation, with the consent of the Council, of Courts of Justice was assigned to the Governor by his commission, and the proprietary patents gave similar authority. The instructions required the royal approval of changes in the judicial system. The prerogative right was undoubtedly valid, and it was freely used for the erection of equity jurisdiction, Northey A.G.[1] going so far as in 1704 to deny to the General Court of Massachusetts authority in the creation of equity courts. New Jersey Courts were originally created by ordinances, and Pennsylvania thus acted in 1707. Dobbs in North Carolina was instructed to erect courts thus, after the judiciary act of 1746 was repealed, the position always being that, where legislation was in force, it could not actually be varied by mere prerogative, which revived in full if the Act were repealed. In Virginia in 1705 the legislature, while creating the General Court, admitted that the prerogative right coexisted. But objections to prerogative action were numerous. The Assembly in Pennsylvania protested against ordinances,[2] the Court of Chancery at New York was protested against in 1735 as illegal, and Nicholson's Court of Exchequer[3] in South Carolina aroused so much indignation that such Courts, though sometimes recommended, were not established in general practice, but, as in New York, Johnston in North Carolina used one to collect quit-rents. The Board also recommended in some cases local acts to establish courts for the trial of small causes as in New Jersey in 1708 and 1758; doubtless it was felt that for these minor matters royal patents or ordinances were out of place. In fact for all judicial purposes, creation of courts and definition of jurisdiction, legislation was very common, and was controlled, as will be seen, in the interests of conformity with English legal doctrines, especially so as to allow appeals and maintain the wide jurisdiction of superior courts, as means of securing justice.

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[1] Chalmers, *Opinions*, i. 182. Courts could be erected directly by letters patent as was the General Court of Georgia with the power of King's Bench, Common Pleas, and Exchequer.

[2] The matter was eventually dealt with by Act in 1731; Root, *Pennsylvania*, pp. 164–74.

[3] On the power see Strange and Ryder, 12 June 1738 (Chalmers, ii. 169–71).

The Governor was also instructed to secure the prompt and just administration of justice, and in this capacity he and his Council regularly instructed the Attorney-General, whose appointment was sometimes retained by the Crown, in the performance of his duties, ordering prosecutions and their discontinuance,[1] though the Board held that the Attorney-General was entitled to act without instructions. The disadvantages[2] of this power were very obvious where attacks on the government were concerned; the Bayard prosecution and the Zenger case are eloquent examples of a Governor's capacity to use the forces of his position against personal enemies.

The Governor was also chancellor and was specially charged with the powers of the Lord Chancellor in England as to the custody of lunatics.[3] As a court of equity he sat either alone, or with his Council, as in Barbados, Antigua, Montserrat, and South Carolina, Bermuda, and Bahamas, when each member had an equal voice. But this jurisdiction was suspect on the score that it meant a licence to disregard the provincial laws, and in Pennsylvania its validity was steadfastly denied. In New York it functioned, if very feebly; in Massachusetts it seems to have been abandoned *de facto*, and Pownall testifies to its general disregard in the colonies. In the West Indies, where the Crown was stronger, it was in better repute. Here also we find the Governor and Council acting as Court of Exchequer on occasion.

A more useful power was that of granting probate of wills, letters of administration, and marriage licences. Either by himself or with the Council the Governor often constituted a court of probate, and in Massachusetts[4] and New Hampshire they served as a court of divorce and matrimonial causes. The Governor personally was always named in the commissions issued under the Act of 1700 for the suppression of piracy,[5] on which sat colonial Governors and other officials as well as naval officers.

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[1] See Yorke, 20 Aug. 1728 (Chalmers, ii. 178 ff.).

[2] See, e.g., the indictment of Bennett of Bermuda in 1708; A.P.C. vi. 78–80.

[3] Chalmers, *Opinions*, ii. 166–9; A.P.C. v. 189 (1772).

[4] In such cases the Governor had not a negative voice, despite the Charter; A.P.C. v. 370–3 (1773).

[5] A.P.C. iv. 74, 485–7, 567.

Ordinary jurisdiction, however, civil and criminal, came to rest with Courts in which the Governor had no seat, save in Virginia, where the Governor and Council, as the General Court, continued to be the highest civil and criminal Court, not merely an appellate body as elsewhere. This right to hear appeals was universal outside Massachusetts, Pennsylvania, and Delaware. The limit of value was early fixed fairly low, thus at over £100 in New York under Cornbury, at over £50 in Maryland in 1713, while in 1753 a general instruction put the figure at £300. The possibility of appeal to the King in Council was open, as will be seen, but it is clear that the cost and delay of such action prevented a full measure of control over the action of the Governor in Council. In Massachusetts the Court of Assistants dealt with appeals, and the Governor and Council of Pennsylvania were not granted judicial authority.

There were Courts of Common Pleas, under various styles, such as Superior Court or Supreme Court with Courts of General Sessions, and a large number of inferior jurisdictions of a somewhat unsatisfactory kind, exercised in the main, as noted above, under statutory authority. Some degree of consistency in their operation was induced by the supervision of the Governor in Council, but that was too much confined to important causes to be of high value as a check.

So far as Imperial authority prevailed, the form of judicature was borrowed from the English, especially in the West Indies. The Board of Trade desired to secure a clear demarcation between petty jurisdiction with limited powers and the central jurisdiction, while ready to advise the practice of creating facilities for sessions of the Superior Court in different districts, thus rendering justice cheaper and more certain. Thus in 1761 the Board noted with approval those provisions of two Carolina Acts of 1760 which created five district Courts to be held by the Chief Justice and three judges, with full civil jurisdiction of every kind where the value exceeded £10 and unlimited criminal jurisdiction, but it disapproved of the grant to Inferior Courts of Pleas or Quarter Sessions of jurisdiction not merely in minor criminal matters as was proper, but in civil matters up to £50 and without limit in matters of testate and intestate succession, and guardianship.[1] In the same way in 1751 Virginia was forbidden to deny access to the General Court in actions under £20 and appeals in actions not exceeding £10.[1] In 1770 New York was forbidden to confine actions in the Supreme Court to matters over £50 in value, and to extend from £5 to £10 the jurisdiction of justices, mayors and recorders.[2] A New Jersey attempt to give County small debt Courts jurisdiction up to £10 in place of £6 was disallowed in 1771 on the score of local partiality and lack of uniformity in decisions of such Courts which in England were restricted to 40*s*. value.[3] With Pennsylvania a long dispute was carried on and many Acts disallowed, because the Assembly demanded that all civil cases should be dealt with in County Courts and the Supreme Court should merely hear appeals, though it was to have the widest power to take cases out of the control of the lower courts. The final compromise gave the Supreme Court original jurisdiction as a Court of Exchequer in revenue cases, thus meeting Imperial views against having to go to the inferior Courts as provided in an Act of 1727 in these matters.[4] In Maryland under Seymour the same issue was vehemently raised; demands being made for an unlimited jurisdiction for the County Courts, while the Governor under instructions from the Board eased the situation by establishing circuits of the Provincial Court which he reduced in 1707 to four judges at a considerable saving.[5]

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[1] A.P.C. iv. 503–6.

In the absence of trained lawyers and judges and in circumstances of executive and popular influence the administration of justice by the Courts could not be expected to reach a high level. The power to declare local Acts void for repugnance was not exercised[6] in this period, though they were often disregarded, as in Maryland in 1711, when suits were allowed in Maryland by the provincial Court despite the terms of an Act.

2. *The Tenure of Judicial Office*

The appointment of judges was vested in the Governor by his commission, and it was only by his instructions that his power was limited by requiring the consent of at least three Councillors. The office of Chief Justice was normally reserved to the King,[1] and some effort was made to fill it worthily. But lack of funds prevented anything effective being done in most cases. Bellomont's energetic effort secured for him a Chief Justice, Atwood, and an Attorney-General from England, possibly with salaries from the Treasury, on the recommendation of the Law Officers who regularly advised when appointments were made from England. But normally the judges all depended on local appropriations, though the Virginian Attorney-General was paid from the quit-rent revenue. The judges, were therefore, like other officers, more or less at the mercy of the legislatures, a fact which influenced decisively the attitude of the Imperial government regarding their tenure of office.

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[1] A.P.C. iv. 139.

[2] Ibid. v. 284.

[3] Ibid. v. 309.

[4] Ibid. iv. 257 f.; Root, *Pennsylvania*, ch. vi.

[5] Osgood, ii. 204 ff.

[6] Its existence is recognized in W. Thomson's report (5 Apr. 1718; Chalmers, ii. 292) on a Carolina Act of 1717.

The only provision early made on this issue was that 'to prevent arbitrary removals of judges and justices of the peace, you shall not express any limitation of time in the commissions you are to grant', while a general power to remove was given in respect of judges and other officers, not, however, to be exercised without good and sufficient cause, to be signified to the King and the Board of Trade. It is quite clear that the instruction as set out was meaningless, for mere absence of limitation of time did not create a tenure during good behaviour, and at most merely emphasized the special sanctity of judicial officers. It is not clear how far patents during good behaviour were issued under this power, which stood unaltered to 1753. Clinton of New York issued such a patent to De Lancey, and this action came before the Board of Trade at the same time as the case of the validity of a patent on like terms granted by Clinton to the Town Clerk of Albany.[2] It was then ruled by the Law Officers [3] that, as the terms of the commission were general, the appointment was valid and could not be vacated. In 1754 a Jamaica Act of 1751, which gave tenure during good behaviour, was disallowed on the score that it was inexpedient to give security in this way to colonial officers, and that in any case tenure should be conceded by the Crown, not by Act.[4] In the new instructions to Dobbs of North Carolina and Reynolds of Georgia in 1754 it was ordered that commissions must be granted during pleasure only. In 1759 Denny of Pennsylvania was bribed to assent to an Act giving power to remove judges only on an address from the Assembly, a proposal objected to by the proprietors, who found the Board ready to disallow on the ground that the principle involved was general and dangerous. The King's death then raised the issue on all sides, and the New York judges demanded commissions on good behaviour, while North Carolina legislated to that effect. Hardy arriving in New Jersey in 1761 was persuaded to give commissions in this way by the argument that otherwise justice would cease to function. The Board, however, on 2 December 1761 laid down an absolute instruction forbidding assent to any bill to regulate judicial tenure and the grant of commissions save during pleasure. Hardy was removed,[1] though before recalled he had succeeded in inducing the judges to accept new commissions during pleasure. Colden in 1762 had to assent to an appropriation bill giving salaries to the judges only if commissioned during good behaviour, while a Chief Justice arrived from England with a warrant under the sign manual authorizing appointment during pleasure only. He was eventually paid from the quit-rents, and acted alone, until the other judges at last accepted new commissions and were allowed eventually salaries by the legislature.[2] The North Carolina Act of 1760 and one of 1761 to the same effect were duly disallowed, despite strong protests by the colonial agent.[3]

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[1] He appointed by sign manual warrant authorizing the Governor to issue a patent; Stokes, *Const. of Col.*, pp. 264–8.

[2] N.Y. Col. Docs. vi. 768 f.

[3] Chalmers, *Opinions*, ii. 177 f.

[4] A.P.C. iv. 216 f., 498.

The arguments of the Board were in effect that lack of adequate salaries compelled the appointment of men who used the office for their own advancement and often became partisans of a factious Assembly whose support had been regulated—as it was apparently in one case at least in New York—by consideration of the measure in which they had served their ends. To give these men ignorant of law tenure during good behaviour, while dependent on the caprice of the Assembly, would be to destroy the interests of individuals and lessen the just dependence of the colony on the mother country. This was sound enough, but it was less convincing to say that, while the change of tenure in England had been due to errors of the Crown, there was no similar need for action in America, for the Assemblies were no doubt justified in regarding the judges as too subservient in many cases to the Governor, who could dismiss them at will,[1] as Cosby had done in the case of Lewis Morris because he decided a salary claim against him. A better argument was based on the difficulty of filling posts satisfactorily and the advantage, when a good judge was available, to be able summarily to vacate an office held by a less fit person. The real solution of permanent tenure and adequate salary appealed to neither party, for both desired to control the judiciary, though neither was candid enough to say so, and the principle was admitted only by both sides in the stress of the revolutionary epoch.

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[1] N.J. Col. Docs. ix. 345–9, 361 f. Morris gave such a commission in 1738; ibid. 207–9, 231, 264.

[2] N.Y. Col. Docs. vii. 470 ff.; A.P.C. v. 550 f.

[3] A.P.C. iv. 504.

3. *The Admiralty Courts*

Side by side with the ordinary local courts for matters occurring in colonial limits, stood the Admiralty Courts, which have been already noted in connexion with the laws of trade.[2] The jurisdiction, however, primarily belonging to these courts was in matters maritime civil and criminal, and the issues and extent of the jurisdiction are fully set out in the commissions as Vice-Admiral regularly given to the Governors through the Lords of the Admiralty, and the commissions to the Vice-Admiralty Judges. There was jurisdiction over offences committed at sea or within any harbour, river, creek, or place where the Admiral had jurisdiction according to English law; and over all causes civil and maritime, embracing charter parties, bills of lading, policies of assurance, accounts, debts, agreements, complaints, offences, and all matters which in any manner whatsoever relate to freight, transport money, maritime loans, bottomry, trespass, injuries, extortions, demands, and affairs whatsoever . . . in, upon, or by the sea or public streams or freshwaters, ports, rivers, creeks, and places overflown whatsoever within the ebbing and flowing sea or high-water mark from all first bridges to the sea. The case of piracy was covered by the Act of 11 & 12 Will. III, c. 7. The commissions were granted under the seal of the English Admiralty and authorized the Governors to hold Vice-Admiralty Courts in the colonies and to appoint deputy judges, advocates, registrars, and marshals, subject to the approval of the Admiralty.[1] In all twelve such Courts were established, from New Hampshire and Massachusetts to Barbados which exercised the ordinary Admiralty jurisdiction, reinforced by the special jurisdiction as to the laws of trade conferred by the Navigation Acts, and accordingly were in a much more active position of utility than the High Court of Admiralty in England. To this jurisdiction was added in 1722[2] power to deal with violations of the Act respecting naval stores, thus increasing the ill feeling against the system in New England which chiefly was affected by the terms of that Act to secure better protection for the woods.

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[1] For an admission and allowance of a Jamaica Act in 1781 see A.P.C. v. 501–4. Judicial immunity from suit for official acts was in this period not recognized in the colonies, but for English proceedings see *Dutton* v. *Howell* (1693), Shower, *Parl. Cas.* 24; *Picton's* case, 30 St. Tr. 225.

[2] See p. 77 *ante*.

Doubts regarding jurisdiction and cognate questions enveloped the court from the first. It was a minor question whether the creation of courts might not properly be ascribed, not to the Admiralty commission but to the general commission from the King, and, though the former view was clearly the more sound, the latter had a very definite effect in respect of appeals. Before the general establishment of Admiralty courts had been decided on, after the passing of the Navigation Act of 1696, the Privy Council had admitted an appeal by Jahleel Brenton, Collector of Customs, New England, in respect of interference with his efforts to carry out the laws of trade.[3] When the question as to the proper court of appeal was raised in 1699, the Attorney-General and Sir C. Hedges, Judge in Admiralty, agreed that appeal lay to the High Court of Admiralty under the commission, but the Privy Council, while not denying the correctness of this view, did not disclaim a more general right of hearing appeals. In 1701–5 it adhered to this position in a case of an appeal regarding the condemnation of the *America* in Antigua. In 1723 the Council declined to deal with the appeal of the owners of the *Pearl*, condemned in 1720 in Rhode Island, on the objection of the informer that appeal did not properly lie. We find, however, other cases of appeals, especially from 1745 on, perhaps as a result of the disintegration of the jurisdiction of the High

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[1] Judges were usually commissioned direct by the Admiralty. For courts in the new colonies see A.P.C. v. 574.

[2] 8 Geo. I, c. 12.

[3] A.P.C. ii. 237–41 (1697).

Court, and in 1768 it was even said that appeal lay naturally to the Privy Council.[1]

The colonial demand for juries was early decided in the negative, for Northey A.G. in 1702[2] clearly advised that, as Parliament had contemplated proceedings in a Vice-Admiralty Court, it must have intended the civil forms to be followed under which juries could not be used, and accordingly no colonial legislation insisting on juries was allowed. But much more vulnerable was the position of the Courts regarding jurisdiction, especially as regards captures made, not on the high seas, but in waters which might be deemed territorial; and as part of that issue, the right of the courts of common law to restrain the actions of the Admiralty Courts, whether by releasing persons committed by them, forbidding execution of sentences, or prohibiting proceedings, whether in the courts or by appeal to the High Court of Admiralty. The troubles of Quary at the hands of Penn were renewed, when in 1717–18 Menzies and Smith, judge and advocate of the New England Admiralty Court, complained that writs of prohibition had been issued. West,[3] however, reported against their objections, accepting the validity in the colonies of the Acts of 13 & 15 Rich. III, cc. 5 and 3, restricting Admiralty jurisdiction and asserting the right of the courts under common law to restrain any excess of jurisdiction. If the courts went too far, then an Act of Parliament might be invoked. In 1721 Dummer in his *Defence of the New England Charters* insisted on the restriction of Admiralty jurisdiction to what was really transacted on the high seas. In 1723 in South Carolina and in 1729 in North Carolina the Admiralty judges complained bitterly of their treatment and the contempt of their authority.[4] Matters were even worse in Pennsylvania;[5] in 1726 the Governor Gordon as chancellor restrained execution of a judgement of Browne in Admiralty because he preferred to have his share of the condemnation in specie, not in money as Browne directed. Next year he prohibited Browne from dealing with the case of the *Sarah* seized at Newcastle for irregular trading, the case being decided in the common pleas, and the Chief Justice of the Supreme Court prohibited him dealing with an issue of seamen's wages on the score that, the contract being made on shore, it was in accord with English usage cognizable only in a common law Court. The Admiralty and Council on representations from Browne and others considered the issues in 1730 and agreed that there should be no unjustified interference with the Admiralty Courts, but, though the issues were again debated in 1732, nothing was done to help them. In fact Browne's commission was denied recognition by Gordon from 1728, and from 1734 the offices of the Court were filled by local nominees to please the proprietor and Governor, with the result that they did nothing to annoy the colonists or to carry out their duties. It is not surprising that in 1760 we find the Governor reporting that illegal trade with France was flourishing under the aegis of the Judge of Vice-Admiralty and with the blessing of the eminent counsel of Philadelphia, none of whom cared to plead for the Crown in this matter. But the system of payment by fees only was thoroughly bad: 'a court partaking of the fruits of its own condemnation is a robber'.

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[1] C.C. 1696–7, p. 444; A.P.C. ii. 356, 376 ff.; iii. 459.

[2] C.C. 1702, nos. 585, 596, 708.

[3] Chalmers, *Opinions*, ii. 207–15.

[4] A.P.C. iii. 57 f., 251.

[5] Root, *Pennsylvania*, pp. 120 ff.; A.P.C. iii. 287.

In New York the Court of Errors in 1739 restrained the Admiralty Court from proceeding with the condemnation of the *Mary and Margaret*, a sloop carrying European merchandise not imported via Great Britain; the ground of the restraint was that the capture was not made on the high seas but *infra corpus comitatus*, and in 1743 an appeal from this decision was dismissed by the Council,[1] though in the case of the *Restoration*,[2] seized under instructions for general reprisals against the King of Spain, a contrary judgement was given in 1741; the distinction in the two cases doubtless turned on the subject-matter of the seizure, in the latter case a question of international law, in the former an issue of trade. But the case of the *Mary and Margaret* illustrates the great difficulties under which the Courts laboured, in face of the hostility of the common lawyers not only in the colonies but in England.

In the case of Rhode Island[3] it was definitely ruled by Northey A.G. on 24 Dec. 1703 that nothing in the Charter permitted the creation of an Admiralty Court, and the Rhode Island law attempting to do so was disallowed on 28 January 1704. Nor was Pennsylvania conceded any authority so to act, Vice-Admiralty Courts being established for all the colonies by royal authority.

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[1] A.P.C. iii. 720 f.

[2] Ibid. 703 f.

[3] Ibid. ii. 547.

In 1762 a serious doubt arose as to the jurisdiction of Admiralty Courts to punish murder committed in the Admiralty jurisdiction, the powers under 28 Henry VIII, c. 15, extending only to authorize punishment in England. Legislation to provide for the grant of the necessary powers was duly recommended.[1]

4. *The Prerogative of Mercy*

The Governor received by the commission[2] a delegation of the prerogative of mercy allowing him to pardon in criminal cases and remit fines and forfeiture, save that in case of treason and wilful murder he might only reprieve until the King's pleasure was taken, while it was usual to restrict his freedom of action in regard to fines and forfeitures to the sum of £10, any further remission needing the royal authority. This power was exercised without the aid of the Council. In Pennsylvania and Maryland the same power was conferred on the proprietor, without limitation of course as to fines and forfeitures, and in the latter case without any reservation as to treason and wilful murder. The difference of treatment naturally reflects the increased supervision noteworthy throughout Penn's grant as compared with that of 1632. In Pennsylvania the Governor seems sometimes to have consulted the Council,[3] while in Maryland the practice after the termination of royal government apparently followed the royal model.

Strong exception was taken to any infringement of the prerogative, as when New Jersey[4] in two Acts conceded an amnesty without excepting even those guilty of high treason, though in that matter the pardoning power was reserved to the King. Massachusetts also in her legislation to indemnify the victims of the Stamp Act agitations most improperly inserted a grant of pardon for the rioters which elicited on 13 May 1767 a condemnation of the measure.[1] On the other hand, there was taken equally strong objection to Acts which deprived the sovereign of his power as by providing for penalties without benefit of pardon, or the killing at sight of those who failed to surrender themselves after proclamation duly made.[2]

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[1] Law Officers, 4 Mar. 1762 (Chalmers, i. 199 f.); A.P.C. iv. 530 f.

[2] For a special grant of pardon to pirates see Northey and Thomson, 14 Nov. 1717 (Chalmers, *Opinions*, ii. 224–6). For the Virginian Northern Neck, Yorke and Talbot, 12 Aug. 1727 (i. 153–5). In 1712 the Queen gave an amnesty for Parke's murder.

[3] Penn. Records, iii. 40 ff., 110; iv. 503.

[4] Morris C.J., Chalmers, i. 189 ff. For 1708, N.Y. Col. Docs. v. 46. On New Jersey see A.P.C. vi. 278 ff.

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[1] A.P.C. v. 86.

[2] Ibid. v. 317 (West Florida, 1772), 336 (North Carolina, 1772).

XI. THE INSTRUMENTALITIES OF IMPERIAL CONTROL

1. *The Imperial Parliament*

THE revolution meant the triumph of Parliament, and the Act of Settlement established the Crown on a definitely statutory basis, negativing finally any theory of divine right. William III was compelled to recognize the supremacy of the legislature despite his struggle against it; under Anne the victory was assured and the Hanoverian line confirmed it. The rash effort of Ireland to question the legislative power was immediately and effectively quelled in 1719. At the same time trade interests with their vital connexion with the colonies and with revenue came to occupy a commanding position in Parliamentary business. It was an age of reports and examinations, through Committees, of witnesses; Boards were required to provide material in abundance for the guidance of the legislators, and much was prepared which resulted indeed in no action but informed Parliament of essential conditions.

In the case of the colonies the Houses could call on the Secretary of State for the Southern Department to afford information and advice. But this business of reporting was more and more assigned to the Board of Trade and remained for a considerable period its chief function, when executive business was taken into the hands of the Secretary of State. The Board was asked to furnish replies[1] for addresses from the Houses asking for information on colonial defence, on Indian affairs, and on the administration of justice—a vital matter to British merchants doing a large colonial trade. Again violations of the laws of trade, the extension of the use of paper money, or piracy, evoked demands from Parliament, while a keen interest was taken in efforts to grow naval stores, rice, silk, indigo, and other raw material needed for British manufacturers. These reports were presented to the Houses by one or other of the members of the Board, which included as a rule both Privy Councillors and members of Parliament. The Board again was responsible for presenting to the Commons the estimates for the Floridas, Georgia, and Nova Scotia whose civil expenses had to be met by grants in aid. The Board was also responsible for drafting legislation on its pet topics; thus during its years of activity it yearly sought to have bills carried to resume the colonial charters, it aimed at protection for pine trees suitable for masts, at preferential treatment of naval stores, at encouragement of pig-iron production and discouragement of paper money. The Houses again asked the Board, or its members in their midst, to draw bills on the important issues which arose, such as the defining the rates for foreign currency. In essence, like the Secretaries of State, the Board came to be distinctly Parliamentary in character; as will be seen, it was created by William III to obviate the erection of a similar authority by Act of Parliament, but with his death and the feebleness of Anne it was converted rapidly and properly into an expression of the will of the Cabinet of the day.

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[1] See Stock, ii. 364–9, 382–9, 394–401, for the Board's first important reports.

2. *The Privy Council*

For the formal transaction of colonial business of magnitude the Privy Council continued throughout this period to exercise the authority which in domestic affairs was rapidly passing away from it. But it suffered an evolution which can fully enough be traced in the records. William III and Anne still could and did sit in Council, not merely to record decisions taken elsewhere, but to consider and discuss; with the Hanoverians the position changed, for the King, by reason of his ignorance of his subjects' speech, abandoned the attempt to discuss matters in Council, and meetings of the King in Council became more and more, as they now are, formal matters, intended simply to register with solemnity and authority the decisions of the King's government. The business of discussion now became essentially done in Committee, that is without the King, a distinction marked by the form of procedure, for the Committees met at Whitehall, while the Council sat at a royal palace.

This change in the Council resulted in an alteration of the position of the Board of Trade. In its inception the Board was treated as if it were a mere Committee of the Privy Council such as had existed under the Stuarts from 1675 and as William had continued, and its reports were dealt with by the King in Council. This was natural enough, for the body created in 1696 was composed of men trusted and liked by the King, and the Board included nominally all the great officers, and even of its working members the most important were Privy Councillors; so that the slight anomaly of having a Committee, on which sat non-Councillors, passed without question. But the evolution of the practice of working in Committee reduced the Board to its true rank; it was recognized as a Board to which matters were referred by the Privy Council and which reported to it, but which had not the weight of a Committee of that august body. Between its recommendations and the formal act of the King in Council was interposed the deliberation of a Committee of Council. In 1715[1] we hear of such a Committee disagreeing with an instruction given to the Governors as regards appeals, but as yielding to the insistence of the Board, which succeeded in having the point recommitted. In 1720 an Order in Council as regards New York bills of credit was passed on the advice of the Committee for Appeals from the Plantations; in 1722 in New Jersey, in 1723 in Massachusetts, and in 1727 in Pennsylvania the same interposition of a Committee is recorded, and the practice was evidently normal. It was, of course, facilitated by the fact that from the beginning of the work of the Board of Trade there already existed in the Council the Committee for appeals, executive and other business from the Channel Islands, and that this Committee was regularly given colonial appeals to hear. It was a natural development to extend the Committee system to other forms of colonial business, and from 1720 colonial matters were dealt with in the usual way by being referred to any Committee which might be sitting. These Committees were essentially different from specific Committees with a fixed membership, such as had been attempted for a time. They were Committees of the whole Council, and were attended by the leading members of the government alone: the Secretaries of State, the Lord President, and a Chief Justice with the Chancellor of the Exchequer often appear. Under Anne the personnel is rather larger, corresponding with the tendency to enlarge the Cabinet. Under George I and George II, by Orders in Council of 1714 and 1727,[2] and again in 1761, the Committees for appeals from Jersey and Guernsey and the Plantations became formally Committees of the Whole, and to them all plantation business was regularly referred. The business, of course, could be combined with any other matters ready for consideration, and it was often treated by Committees sitting for domestic or foreign business; the members were much the same, and the title under which the Committee was recorded was merely derived from its chief business for the meeting. The numbers present under George I varied from 4 to 8 but sometimes rose to 14, as against 6 under William III. The range of business was now extremely wide, for appointments of Councillors only seem to have been passed to the King in Council from the Board without the approval of the Committee; as early, however, as 1702[1] we find a report on Barbados Acts thus referred to a Committee of the Whole; such reports now were always laid before the Committee before they could be approved by the King in Council. After 1727 the terms Committee 'for Plantation Affairs' and 'for Hearing Appeals from the Plantations' are often found, but they designate simply Committees of the Whole, which were fixed to consider *in primis* one or other sort of business. There was no specialization even for judicial appeals; in 1745 the same Committee dealt with Irish Bills and then disposed of appeals from Jersey and Rhode Island. On these Committees a Secretary of State often sat as did the President of the Board of Trade, though curiously enough Halifax sat more often before his powers were increased than later.

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[1] A.P.C. ii. 694.

[2] Ibid. iii. 158 f. All prize appeals were assigned to the same body. In 1761 for prize matters the judges of King's Bench, Common Pleas, and Exchequer were added; A.P.C. iv. 501.

Procedure now was that, when any matter came before the Council, it was referred to the Committee, which then sent it to the Board of Trade, or from 1758 direct to the Board, and the recommendation of the latter came back to the Committee for submission as approved or altered to the King in Council or for reference back to the Board. The Board would hear the parties to any matter, take evidence, examine documents presented, and report; then if their report were opposed by either side, it could be discussed by counsel before the Committee, which, however, did not take evidence. Thus the petition of Connecticut for Parliamentary authority to validate the intestacy law pronounced invalid in *Winthrop* v. *Lechmere* was referred by the Committee to the Board, which represented in favour of such an Act but also of an abrogation of the Charter; this report was opposed by counsel before the Committee.[1] Doubtless this procedure gave opportunity for loss of time through idle opposition; when Rhode Island found its attempt to have commissioners appointed to decide its boundary with Massachusetts in 1738 obstructed by the request of the Agent of that colony to be heard by counsel against the proposal of the Board, the Privy Council ordered that in future security must be given by opponents to pay any costs awarded by the Privy Council against them.[2]

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[1] A.P.C. ii. 415. *Per contra* judicial issues were in 1701–2 sent to the Board, ibid. 380 f.

3. *The Secretary of State*

The most important part of the executive work of control of the colonies from 1704 rested with the Secretary of State for the Southern Department, though in mere volume the correspondence of the Board of Trade and its reports[3] bulk larger. Appointments, defence by land and sea, finance as connected therewith, diplomatic issues and relations with the Indians, and generally all political issues were his special care; but nothing was excluded from his sphere, and it rested vitally with him during the greater part of the life of the Board of Trade to decide the nature of its functions. In every case, however, he insisted on being informed of any proposals of the Board. Sunderland from 1708 required it to send copies of its representations to the Council, Carteret preferred to submit them himself to the Council, but the former method was normal. Moreover, the Board referred to him specially all political and international issues; questions of Indian policy and defence; violations of the laws of trade; internal disturbances as in New Jersey, or the resistance to the Stamp Act. All these matters came to the Board from the colonies or from communications by merchants and others in London, and promptly were intimated to the Secretary's office for his disposal, or for return for report. Either Secretary of State might attend at pleasure the meetings of the Board,[4] and sometimes the other Cabinet Ministers sat with the Board to discuss serious issues such as the disorders of New Jersey, naval stores, and Indian wars; or a Cabinet or Committee of Council meeting might be summoned and the Board caused to attend, as in 1751 it met the Cabinet on the issue of the defence of Halifax.

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[1] A.P.C. iii. 274 f.

[2] Ibid. 438 f.

[3] Andrews, *Am. Hist. Ass. Rep.*, 1913, i. 319–416.

[4] Making up the 'Great Board'. The last case was in 1749.

The Secretary of State under the earlier régime seems to have been willing to leave to the Board normal correspondence with the colonies, but all this changed after 1714, and in 1715 the Board with a remnant of its former energy is found rebuking Stanhope for appointing as Lieutenant-Governor of New Hampshire a man whose interests were bound up with the sawing of the trees which he was supposed to preserve for service as masts. Newcastle, however, went further, for he engrossed in 1724–48 all correspondence, and the Board's letters to Governors sank to one in two years. In 1726, 1727, and again in 1735 the Board wrote to invite information on the orders given in the Secretary's office, but without eliciting any return. Matters of course vitally altered between 1752 and 1761 when Halifax was in control, but in 1766 the rule that Governors should primarily correspond with the Board as decided in 1752 was reversed, and they normally corresponded with the Secretary of State, sending copies to the Board. In July 1768, however, when Hillsborough was President again as well as third Secretary of State,[1] all correspondence came to him alone, and the Board ceased to have a distinct personality. The new office and the Board both fell with the loss of the American colonies under the attack of Burke in 1782, both, however, to be revived under new auspices and to become the Secretaryship of State for the Colonies (supplemented by a similar office for the Dominions in 1925) and the Board of Trade.

In accordance with the spirit of the day the Secretary of State grasped at the patronage of the colonies. To the Board of Trade was permitted merely the appointment of Councillors—normally on the suggestion of the Governor—and of the Secretary, when an office of minimal worth. Governors were regularly the affair of the Secretary of State, save during the period 1752–61 when Halifax insisted on exercising the power.[2] Removal of Governors also rested with the Secretary of State who advised the King, save for the same period, but a vestige of the Board's power is to be seen in its effective recommendation in 1762 of the removal of Hardy, who in New Jersey had violated instructions by appointing judges to hold office during good behaviour. Doubtless the division of authority between Secretary of State and Board in this as in other matters was not conducive to effective action, for the Board had always to face the possibility that the Governor, relying on his interest with the Secretary of State, would pay little heed to their wishes.

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[1] The post was restricted to colonial business until Germain in 1775 was appointed without limitation; in 1779 the Presidency was revived until 1782; Basye, *Am. Hist. Rev.* xxviii. 13–23.

[2] For his patronage list see Basye, *The Board of Trade*, pp. 230–2. Councillors remained under the Board's control even after 1761.

4. *The Board of Trade*

William III's pro-Dutch proclivities had a considerable part in the movement which forced him to abandon reliance on a Committee of the Privy Council alone, and to create a Board of Trade to aid in colonial administration. It was rumoured that the losses of the merchants in the war were not unconnected with the King's willingness to see Dutch trade flourishing, and the House of Commons was induced to assent to the principle of the creation of a Council of Trade to be named by Parliament with wide powers to control commerce, appoint convoys, further plantation trade, and provide for the poor. The inroad on the prerogative was obvious, and the discovery of the plot against the King probably helped the House to drop the bill after second reading, and to acquiesce in the creation by commission on 15 May 1696 of a Board on the usual lines.[1] The great officers of State were members, but excused from normal attendance; they might do so when specially invited or *proprio motu*, or the Board might be called in to consult with the Cabinet. The paid members who did the work normally were eight, at £1,000 a year, £500 (later £1,000) extra being granted by the Secretary of State to the President. Three was a quorum for ordinary business, but representations to the Privy Council or the King were signed by five. Its functions were essentially commercial; it had to deal primarily with English trade; secondly, with the employment of the poor; thirdly, with plantations. The points indicated were the securing of naval stores and raw materials otherwise procurable only from foreign States, and the encouragement of any suitable manufactures with the discouragement of any prejudicial to England. To enable it to carry out these functions, it was charged with preparation of instructions for Governors and conduct of correspondence with them, and preparation of reports on matters of interest. It was to suggest for appointment Governors, Councillors, and other officers, but not to appoint. Colonial legislation was to be considered in order to recommend to the King in Council which laws should be allowed to stand, and which should be repealed. Complaints of oppression and maladministration were to be reported on for the decision of the King in Council. The Board might send for persons and papers and examine on oath, though this was scarcely ever done.[1] It could apply for legal advice to the Law Officers.

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[1] Stock, ii. 156–60, 162; MSS. House of Lords, 1695–7, p. 419. It was usually styled Lords Commissioners of Trade and Plantations, but also Council of Trade. The Auditor-General was later made an *ex officio* member.

The first Board was presided over by the Earl of Bridgewater and numbered among its members John Locke, William Blathwayt, and John Methuen, nor is there any doubt of its energy. The presence of two Privy Councillors and two members of Parliament meant that it was in touch with the government and the Commons, and its energy was sustained to the close of the rule of Anne. It was not its fault that its great efforts to destroy the chartered colonies were thwarted. Its efforts were expended in enforcing the laws of trade and in suppressing piracy, in both of which undertakings it had considerable success. In 1710–11 its political complexion altered with the advent of Tories to power. On George I's accession a completely Whig Board was created, and a period of decline in talent and work appears. The members were placemen determined to do as little as possible; under Sir John Monson's presidency (1737–48) the Board reached a nadir of inutility; it became an information bureau of a very inferior kind. It was in this epoch that Martin Bladen, M.P., served thirty years on the Board without leaving any memorial of his service more valuable than a suggestion of a stamp tax. The Board, of course, was not finally responsible for its eclipse, for that depended on the will of Newcastle as Secretary of State, but men of parts should not have accepted posts in which they could render no real service.

A new era of usefulness was started when Lord Halifax was appointed to succeed Monson in 1748 at the instance of Bedford, who felt that the aspect of affairs in New York and New Jersey demanded an able man in the office. The foundation of Halifax in 1749 forms a permanent memorial of the President's energy. He found, of course, that the position of the President as it then stood was quite intolerable for a man of first-class ambitions. The Board had lost the power of doing anything, except on express reference from a Secretary of State or the Privy Council, and he insisted on resignation if he were not given a stronger position. A Privy Councillorship was refused by the King in 1751, but by Order in Council of 11 March 1752[1] the control of plantation business with the duties of control of correspondence with Governors and of patronage (save, of course, in the Admiralty and Customs services) was ascribed to the Board, and Halifax received a salary of £2,500, not of Cabinet amount. Though nominally a collegiate body, his position gave him the advisory—not executive—powers of a Secretary of State, and after a resignation in 1756 he forced in 1757, by another resignation, the grant of the seat in the Cabinet, though the rank of Secretary of State was still denied; in 1761 he became Lord Lieutenant of Ireland. Among his colleagues, all now M.P.s, were Francis Fane, one time attorney to the Board, and the erratic genius, Townshend. His successor Samuel Sandys was a mere party hack,[2] but the Board, while it lost by Order in Council of 15 May 1761 its patronage, still controlled correspondence. But at the same time the Secretary of State resumed his share in correspondence and absorbed important issues. For one month in 1763 Townshend held the office of President, to be followed by Shelburne, Hillsborough (1763–5), Dartmouth, and then by Hillsborough again when Shelburne in August 1766 became Secretary of State for the Southern Department under Pitt. Hillsborough, however, insisted that the Board should lose all executive power, particularly Treasury business, and be reduced to an office of reference only, Governors[3] being no longer instructed to correspond with it only, and he refused to be of the Cabinet. His attitude is difficult to understand at this time. When President in 1763–5 he was markedly active in insisting on the revision of colonial laws, and he soon resigned in 1766. But at any rate in January 1768 he was made third Secretary of State for the American Colonies, and in that capacity was responsible for much of the mismanagement of Imperial issues until 1772, when he resigned on his western policy failing to find approval, and Dartmouth succeeded, to yield in 1775 to the ill-starred Lord George Germain. From July 1768, therefore, the Board's President was a Secretary of State, and the Board as an independent organism had ceased to exist.

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[1] e.g. in 1726 as to African trade; J.C.T,P. 1723–8, p. 258.

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[1] A.P.C. iv. 153–7. In important matters and on orders from a Secretary of State correspondence was to go to him only.

[2] For Pitt's responsibility in delaying the creation of a Colonial Secretaryship see Basye, *The Board of Trade*, ch. iii.

[3] Henceforth correspondence was to go to the Secretary of State, duplicates of non-secret papers being sent to the Board; A.P.C. v. 3, 4. The Board's decline was thus accelerated. Its functions as a reporting body especially on Acts are insisted on in Sharpe's memorandum, A.P.C. vi. 473 f. The Treasury compelled the Board to continue to prepare colonial estimates, including those of Senegambia and St. John's.

The tenure of members of the Board was not unpolitical; though naturally, after the clean sweep on the accession of George I, no such drastic change took place in its composition, substantial alterations happened in 1742, 1755, 1761, 1763, and 1765. Minor men had long terms; Soame Jenyns put in ten years before and fifteen after 1765, but is known merely for his amusing attack on the objections to the taxation of America.

The Board, it must be remembered, was more than a machinery for plantation business; it was concerned with many aspects of English commerce, and especially in its earlier period was notably active in preparing memoranda and instructions on treaty negotiation in commercial matters. The boundary for the Hudson's Bay Company's territories was suggested at 49° in 1719 for the negotiation with France. This pressure of treaty work at the close of the War of Spanish Succession no doubt explains, if it does not excuse, the great delay in 1713–18 in dealing with correspondence, but from 1730 on at any rate the Board was ineffective and slothful even in handling matters referred to it, under the numbing influence of the absorption of its interesting and responsible work by the Secretary of State. To Virginia no letter was sent from 13 September 1732 to 4 September 1735. But Halifax's energy altered all that for the time being. The office work and the staff grew gradually; in 1708 the total expense was only £1,150, but the clerks, though not legally entitled to fees, were regularly paid for the work done for outsiders in any way, and not until 1724 were they forbidden to act as agents for the colonies. Finally in 1731[1] the common-sense plan of fixing a table of fees was laid down, specifying the sums to be charged for drafts of commissions, instructions, private representations, and so on. In 1730 a Solicitor and Clerk of Reports was added, to undertake the business of securing that the Law Officers and other departments returned replies to the Board's inquiries and to prepare reports for Parliament; the post was later held by John Pownall, to whom are doubtless due the exhaustive accounts of affairs in New York and New Jersey under Halifax's term of office. From 1718 the Board had its own counsel to relieve the Law Officers of detailed business, though they were still consulted on all issues of importance; the incumbents were Richard West, who became Chancellor of Ireland in 1725, Francis Fane, who became a member of the Board in 1746, Matthew Lamb, who died 1768, and Richard Jackson in 1770–82. Most important of all, of course, was the Secretary, an office filled by John Pownall in 1758–76, after service from 1745 as Clerk of Reports, and from 1753 as Joint Secretary. Two-fifths of the fees fell to him, and his influence induced Colden to ask him to act as agent for New York, an offer which he declined, suggesting instead Edmund Burke's name, and thus securing his advocacy of colonial claims. The clerkships, which normally led up to the office of Secretary, were in the gift of the Board, tenure was for life during good behaviour, in practice though not in law, and occasionally a Governorship might be won from the office. The parallel with the modern Colonial Office is close, though with the important difference of competitive appointment in lieu of patronage and a fixed retiring age.

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[1] A.P.C. iii. 319 f. In 1764 the staff was 12, at £1,840.

5. *The Treasury Board*

The office of Lord High Treasurer was in regular commission from 1714, and the Board consisted usually of the Chancellor of the Exchequer and three junior lords. Its activities in all matters of finance were indefatigable, and finance in the plantations necessarily involved its close contact with the Board of Trade. Moreover, it was to it that the Board had to go when it desired to suggest the adoption of plans for the benefit of colonial trade by the grant of bounties on naval stores, or as in 1751 the removal of the impost on American potash under the tariff of 1672 in order to encourage its local production, while the Board was in turn consulted in all the matters leading up to the series of revenue acts affecting the colonies from 1764 on. Officers who were employed under the Treasury in the Colonies such as Bridger, for many years surveyor of the woods in America, reported regularly to the Board, and could invoke its benevolent intervention in salary disputes.[1] A very considerable amount of work was involved on the Board by the decision in the last two French wars to refund to the colonies part of their expenses, for colonial currencies varied in value, and allowance had to be made for the fact that clothing and supplies had been paid for in some colonies at unduly high rates. The great subsidies voted in 1756–63 were apportioned on the Board's advice, after prolonged investigation, for, as experience in the case of New Jersey in 1750 showed, the colonial claims were often inflated, an experience not unrecorded in the war of 1914–18.

6. *The Commissioners of Customs*

Subordinate to the Treasury was the Board of Customs, created in an imperfect form in 1671, extended to Wales in 1676 and to Scotland in 1723, but divided into two bodies, for England and Wales and for Scotland, in 1741. The Imperial customs officers in the colonies were under their direct control down to the Act of 1767, creating a special board for the American Colonies, and there was, therefore, necessity for the closest co-operation between the Board and the Board of Trade. The Governors were constantly enjoined to afford aid and encouragement both to the customs officers and the naval commandants of the Imperial forces, when engaged in helping the customs to control illicit trade. Instructions on trade matters were formally given to the Governors through the Board of Trade, but the exact terms of these instructions were decided upon in correspondence with the Customs, which thus was able to keep them up to date in accordance with the changes in the laws of trade. Considerable alterations were effected, therefore, in the instructions in 1752 on the basis of earlier suggestions. All laws affecting trade or customs were sent by the Board to them for observations, and their opinion was frequently acted on; a hesitation to advise unless specially asked by the King in respect of a Virginia Act of 1730 as to shipping tobacco may be put down to a departmental quarrel, which was smoothed over. Personal conferences were possible, of course; thus in 1709 the two bodies discussed the Virginian act fixing ports of entry, the administration of the Act of 1707 giving bounties on naval stores, and the vexed issue of convoys. So also the two Boards supplied each other with invaluable information; the Board of Trade secured knowledge of statistics of imports and exports, the trade at various ports, and the operation of trade laws, while they sent to the Customs the reports which they obtained from the Governors regarding evasions of the Navigation Acts. Officers of customs, especially in the great days of the activity of the Board before 1714, were invaluable to the Board in their capacity of supplying information on the defects of colonial administration; Randolph's successor Quary was as active as he in denouncing the proprietary governments for their connivance at piracy and breaches of the Imperial trade system.

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[1] A.P.C. ii. 454–6. The Treasury controlled the disposal of royal revenues (§ 8), e.g. the 4½ per cent. Leeward dues, which Parliament in 1702 desired to be devoted to defence, but which were misappropriated for English uses; Stock, ii. 455 f.; A.P.C. vi. 107 f. (1716); and Virginian quit-rents, the balance of which went to England from 1705; A.P.C. vi. 100. It was consulted on the treatment of fines, forfeitures, escheats.

The local officers of the Customs gradually increased in number and efficiency as fixed salaries superseded mere fees. As time went on, even in Rhode Island (1709) and Connecticut (1715) officers were placed, and, of course, in Nova Scotia. At its maximum there were some forty-seven ports with nearly ninety officers, surveyors, riding surveyors, collectors, comptrollers, searchers, preventive officers, land and tide waiters, together with the humbler watermen, boatmen, and clerks. As a rule, each colony formed a district, but South Carolina and the Bahamas went together and the New England district comprised the area from southern Rhode Island to eastern Nova Scotia. The collector was normally the only officer, but Boston and Savannah boasted a comptroller, surveyor, and searcher, while New York had comptroller and collector. On the Delaware there was a collector at Lewes with a comptroller at Philadelphia, who acted for the whole bay. From 1709 there were three surveyors-general, one for the northern area, one for the southern with Jamaica and the Bahamas, and one for Barbados and the Leeward Islands; later three were allowed for the mainland.

Individual surveyors-general were given seats on the Governor's Councils by special favour as in Randolph's case, while from 1733 the rule was absolute, as a measure well designed to secure due regard for Imperial interests and to keep the Governor in touch with the customs administration. The officers were, of course, paid from the customs establishment, and were not subject to dismissal outright by Governors, who could merely suspend and appoint officers temporarily to act.

The functions of the several officers were laid down by orders from the Customs, especially detailed after the Act of 1696 but often enlarged and varied. The surveyors-general were charged with general control of their districts, with putting all laws and orders into force, with inspecting, visiting, and searching ships, houses, warehouses, &c., for uncustomed or prohibited goods. By them were appointed the riding surveyors who moved in the more remote and unfrequented areas, inspecting, searching, and seizing, like their superiors. The comptroller was essentially a check on the collector, aiding him in examining vessels and enforcing the Acts, and certifying his accounts. The collector had the business of collecting the duties under the Acts of 1673 and 1733, of inspecting all certificates and cockets, and of seeing that bonds, when they had to be given in the colonies, were duly made out with substantial sureties. He had, of course, if necessary to sue out the bonds. Duties were to be collected in silver or its equivalent and accounts were rendered annually to the Customs, supported by the signature of comptroller or surveyor. The collector furnished a bond of £500 for faithful performance of duty, and took one of similar amount from the naval officer, though the latter was not an Imperial official. The business of issuing Mediterranean passes to secure safe passage from the Barbary states was often entrusted to him, but in New England the secretary of the colony undertook the function. In legal theory an officer must not engage in trade, and in those cases where the collection of the King's revenue was in his hands, this rule was enforced. But the service was far from ideally managed. The miserable practice of allowing the titular officers to act by deputies, who were local men ill remunerated and holders of as many other offices as they could engross, was responsible for the utterly slack performance of duty; it was infinitely more popular and profitable to accept bribes to connive at illegal importations than to incur unpopularity and physical danger by insistence on laws which no colonials liked, and many Governors would not help to enforce.

7. *The Admiralty and War Office*

The Admiralty was in commission regularly from 1708, and the relations of the Board with the Board of Trade were necessarily close and intimate. Both were vitally interested in the naval defence of the colonies and in naval co-operation in military operations in America; in 1750 Halifax showed his energy in his new office by pressing Newcastle and the rest of the Cabinet to overrule the reluctance of the Admiralty to afford Nova Scotia the naval protection which seemed needed. Later, the navy was used from 1763[1] especially in suppressing actively illicit trade. The duty of dealing with piracy was necessarily one which required the assistance of the colonial Governors obtained through the Board, and Bellomont set in his term of office an example to be imitated in his efforts in this question. As early as 1702 we find the rule laid down that officers under the Admiralty should be specially commended to the aid and protection of the Governors. But quarrels were not unfrequent, and the influence of the Boards was needed to secure harmonious working. Matters of convoys and encouragement of naval stores were other issues in which the Boards worked together in harmony, though at the outset the Admiralty was inclined to regard the Board of Trade as not worth direct correspondence, and would act only through the Privy Council.

Under the Admiralty were the Navy Board, which took direct charge of the navy, while executive and military matters occupied the attention of the Board of Admiralty, the Victualling Board, the Board of Transport Service, Navy Pay Office, Treasurer of the Navy, Greenwich Commissioners, Prize Office, and minor Boards with which occasionally the Board of Trade had contact. Greenwich Hospital had a special interest in the colonies, for in 1729[2] the same rule as to contributions to its maintenance as applied in England was made binding on colonial seamen,[1] though the revenue was hardly collected until in the new enthusiasm of the post-war era in 1768 Hulton was appointed Principal Deputy Receiver in America with receivers under him. The fishermen of Salem and Marblehead refused to pay, but in three months nearly £400 was levied, despite much indignation in the colonies.

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[1] 3 Geo. III, c. 22.

[2] 2 Geo. II, c. 7; Beer, *Brit. Col. Pol.* 1754–65, p. 288.

In military matters prime political authority rested with the Secretary of State for the Northern or Southern Department according to the region of war, but the latter controlled the militia. Arms, ammunition, barracks and fortifications, artillery and engineering corps were under the Ordnance Board which was in direct relation with the King; victualling and transport were managed by the Treasury and one of its officers was Paymaster-General. Increased importance attached to the office of Secretary at War who was charged with counter-signature of commissions, recruiting, inspection, and marching orders, and prepared the estimates and defended the army in the Commons. Barrington, when in office, engaged busily in correspondence with colonial Governors and Commanders-in-Chief on issues of transport, supplies, and money, while the Secretary of State and the Commander-in-Chief dealt with issues of strategy. It fell to the Board to secure military aid for the colonies both in war and in peace, and it often had to seek from the Ordnance Board gifts or grants on repayment of arms and ammunition, while advice was necessary as to the erection of defence works. All these matters involved close co-operation with various branches of the military organization.

The Admiralty was solely responsible for the Governor's commission and instructions as regards Admiralty Courts, the Board merely acting as a forwarding agency.

8. *Colonial Audit*

Throughout this period there continued in existence the post of Surveyor and Auditor-General of the King's revenues in the American colonies, first held by Blathwayt, and later providing a comfortable if not overworked office for Horatio Walpole. He was authorized under Treasury warrants to appoint deputies in the colonies, and, with their aid, it was his duty subject to instructions from the Treasury to examine and report on the accounts of all officials in the colonies charged with the care of royal revenues, and in this office he was entitled to the full aid of the colonial officers. From his control were excepted revenues collected under Imperial Acts since these were entrusted to other officials, and naturally English duties collected on colonial imports or exports to the colonies. But his sphere covered all hereditary or prerogative and appropriated revenues, including the 4½ per cent. dues in Barbados and the Leeward Islands, colonial import and export and tonnage dues, port and weigh-house dues, prizes and prize dues, the royal share of vessels and cargoes condemned for illegal trade, fines, forfeitures, escheats, quit-rents, licences, wrecks, treasure trove, and droits of the Crown as opposed to those of the Admiralty. But, as was natural, efforts were made by the Crown to extend the sphere of authority of its auditor, and to include in his survey not merely all indirect but also direct taxation and expenditure, but without any very definitely useful results.[1] The Auditor's pay was increased from the £500 assigned to Blathwayt (£100 from Virginia, and the rest from the West Indies) to £600 approximately in respect of his care of New York, and from 1730 the Carolinas were supposed to give £100 each, thus ensuring Walpole £800 as well as some fees, but New York and the Carolinas could not be relied on.

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[1] They were also liable to be impressed for naval service, a matter raising constant friction, e.g. in 1703 in Jamaica (A.P.C. ii. 442, 453), and in Massachusetts in 1711 and 1745, when men were killed and the Assembly protested; Osgood, iii. 560 f. For 1775 see A.P.C. v. 409.

9. *The Bishop of London*

For ecclesiastical matters the real authority was normally the Bishop of London,[2] who was not merely an *ex officio* member of the Board, but who took an active part in its proceedings when issues of church interest arose. Commissions and instructions to Governors were communicated for his views if any change were proposed, and the reports of the Governors when they touched spiritual matters were sent for his consideration, while laws on these topics were his special care. His presence was specially requested at meetings to consider the Maryland laws of 1705 against Popery, and he was largely instrumental in securing the repeal of the Virginian laws fixing ministers' salaries which gave rise to the *Parson's Case* and enabled Patrick Henry to achieve a cheap fame. At his request in 1727[1] Governors were asked to secure laws against blasphemy, profanity, adultery, polygamy, profanation of the Sabbath, and other moral wrongs which were not *per se* effectively punished by the common law, though these admonitions seldom took effect. He was responsible also for objections on religious or moral grounds to proposed appointments of Councillors. In theory also ministers sent to the colonies from England should be approved by him, and the Board in 1715 duly commented on the lack of piety, principles, and exemplary life conspicuous in some of the appointees.

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[1] For New York's refusal in 1717–19 see N.Y. Col. Docs. v. 551 ff. The royal revenues were essentially the business of the Receiver-General as opposed to the Treasurer; cf. Virginia in 1716; Osgood iii. 239 ff.; Quebec in 1765; A.P.C. iv. 725 f.

[2] See ch. viii, § 8.

10. *The Colonial Agents*

Throughout this period a most useful part in the business of home administration was played by the colonial agents who represented the interests of the governments in London. It was, of course, an elementary idea that matters interesting a Governor or the colony should be pressed on the attention of the home government by some envoy,[2] and from the restoration onwards the King made no secret of the utility of such aid. The evolution, however, of resident agents paid salaries and under control of the Assemblies or the whole legislature was slower than might have been expected. Thomas Povey suggested to Lord Willoughby his own appointment to serve both as his representative and to act for the island, but only in 1671, and then on the suggestion of the Gentlemen Planters in England, was Thornburgh appointed by the Assembly to speak for it. A more permanent system dates from 1691, when first agents were appointed and salaries provided by an Act, while St. Kitts in 1683–4, Antigua in 1684, and the Leeward Islands Federation in 1690 adopted a similar procedure. In Jamaica part of the settlement of 1680 permitted the Island to have an agent, and one was appointed under an Act in 1682, followed by Acts in 1688 and 1692. It was on the strength of these measures that in 1697 the Board of Trade advised Maryland, Virginia, and New York to set up similar agencies by Acts. In 1701 the same advice was given to Maryland and again in 1713 to New York; the Board explained carefully that business had to be facilitated by the payment of fees to the other offices and that in default matters such as taking out commissions or securing reports on Acts could not be furthered. So in 1719 Massachusetts was reminded that, if private Acts were to be dealt with, there must be an agent for this end. As Acts were regularly referred to counsel, it rested with those interested in having them confirmed to attend on him, explain in detail the purpose and local circumstances, and by paying his fees secure an early—and perhaps favourable—report. But there was much more than this to do. An agent must be quick to follow Parliamentary proceedings and take steps to oppose anything unfavourable to his colony, and to promote what was suitable in its interests, press its claims for defence, and supply information useful to his colony to the departments of the Imperial government. The West Indian agencies were specially well organized and effective by reason, in part, of the strength of the West Indian influence at London; if the success in obtaining the Molasses Act in 1733 was largely due to special representatives from Barbados and Jamaica, the agents were active in 1738 in procuring permission for direct exportation of sugar to foreign ports. The agents for the American colonies were constantly called upon to defend the legislation of the colonies before the Board of Trade, while they were consulted unprofitably in the issue of the raising of revenue for defence in 1764. The agents also were often active in begging for aid in defence and military stores.

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[1] A.P.C. iii. 153.

[2] Agents first appeared from Virginia in 1624; Penn's charter compelled an agency in London. See Tanner, *Pol. Sci. Quart.* xvi. 24–9.

Constitutional problems were early to arise regarding the appointment. The Imperial government desired selection by Act, which meant the co-operation of all parties in the selection and the full authority of the agent, but the Assemblies revolted on occasion, and at one time Massachusetts was represented by two, one for either house. In Barbados from 1697 to 1705 the Assembly by tacking the appointment to an excise bill secured control of the agent. In 1709 for Barbados and in 1768 for Massachusetts the Board of Trade ruled that the whole legislature must share in the appointment. The Assembly in 1728–32 again renewed the attack but at last yielded, though in fact the nomination of the agent really rested with it. Rather than accept the rule of joint appointment Jamaica passed no act in 1704–32, though the Assembly from 1724 was actually represented by agents of its own, whom the Board accepted without inquiry into their credentials. In the case of the Bahamas the agent was first appointed in 1758 on Shirley's advice and by Act, and the same plan was adopted in the Virgin Islands in 1774, when John Pownall, Under Secretary of State in the American Department, was selected. Grenada, St. Vincent, and Tobago followed suit, though in Dominica a dispute between Council and Assembly lasted until the latter yielded in 1771. Planters and merchants and civil servants figure conspicuously among the agents of the West Indies, but only politicians of minor note, while the agencies of Dummer, Burke, and Franklin lend lustre to American history. Partridge rendered important services for New Jersey in its final separation from New York, for Rhode Island in the Narragansett issue, for Connecticut, and for New Hampshire, though in 1741, on a charge of obtaining improperly a copy of a letter, the Board refused to permit him to act until he had cleared himself.

The issue of control by Council or Assembly raised tedious discussions of no special importance. As a whole, the legislature which appointed had considerable power, for the appointments were given by short term Acts, and it was easy to end the agency by merely substituting another name. Moreover, the agents normally paid out on behalf of the colony, expecting to be recouped, and, by refusing to appropriate, a peccant agent could be brought to book.

In 1759 we find an example of an agency of a new sort, the forerunner of the present office of Crown Agents for the Colonies, in the appointment of the dramatist Cumberland as Crown Agent for Nova Scotia, with purely financial duties, by royal warrant. Similar cases of appointment followed in 1764 for Grenada and Quebec before the establishment of representative government in full in either colony.

XII. THE SUBJECTS OF IMPERIAL CONTROL

1. *The Review of Legislation*

IT was an instruction to the Governors to send home within three months—on pain of displeasure and loss of salary—all Acts passed duly signed and sealed, for consideration by the Board of Trade. The power to disallow was absolute, save that in the case of Massachusetts the Charter allowed three years and in that of Pennsylvania six months after receipt, while in the case of the latter colony laws were to be forwarded within five years—an absurd length of time. As receipt was by the Crown reckoned from the time when the Privy Council received an Act,[1] from 1735 the two colonies sent their Acts direct to that body and not to the Board of Trade. The Council then sent the Acts, which came to it direct, through its Committee to the Board. Or Acts might be received by the Secretary of State, who might send them to the Board, or to the Privy Council, in which case they came from it to the Board. Its duty was to report on them for the consideration of the Committee and decision by the King in Council, whose action was a formal carrying into effect of the report of the Committee. After the Board's report had left the office it had no more to do until the Order in Council[2] was sent to it, automatically after 1697, when it informed the Governor or colonial agent, unless indeed the matter was referred back from the Council for further consideration, or a joint meeting was summoned by the Committee.

In considering laws the Board had the advantage of the legal advice of its own counsel from 1718 supplemented by that of the Law Officers and of the department concerned, the Treasury and the Customs, the Auditor-General, who was subordinate to the Treasury, the Admiralty and the military departments, the Bishop of London, and, rarely, the Postmaster-General, not to mention the less formal representations and advice of the English merchants. On the other side was the eager assiduity of the colonial agents, while private individuals concerned in legislation were able to urge their views. In a very large number of cases—some three-quarters—the Board was not compelled to make any final report; many laws had expired ere they came for review, and many others were allowed to lie by probationary. This might merely be to allow of amendment before final decision; so a Massachusetts Act of 1764 was held over to see if the colony would repeal the double impost on goods imported by other colonials. Or delay served to secure other information, as when the Indian trade Act of New York was delayed pending further light on its effect. Similar was the plan of allowing time to elapse as regards private Acts, so that any persons interested might make representations. In many cases the motive was expedience; an Act confirmed could not be disallowed, as Northey A.G.[1] reported in 1703; hence, if there were any doubt, the Act was allowed to remain in operation, the power remaining to disallow later when occasion showed the wisdom of such action. This was impossible only in the case of Massachusetts and Pennsylvania, provided in the latter case the Acts reached the Council Office within five years. If this did not happen, then on one view the Acts should have been void, but apparently this doctrine did not prevail, and such Acts became confirmed unless disallowed within six months after actual receipt. Though the Board did not readily disallow Acts long in being, there was no hesitation in doing so if the occasion demanded; the Virginian Act of 1663 penalizing Quakers was disallowed in 1718 when its existence came to light. A few years' operation meant nothing. The Massachusetts Charter compelled consideration of the Acts seriously after they had lain two years probationary as provided by an Order of the Board in 1735. When in the hands of the proprietors Carolina,[2] Maryland, and Connecticut and Rhode Island under their Charters were under no obligation to send laws for approbation, but this was done to some extent by Maryland, while on several occasions the Chartered Colonies sent home collections of Acts. But these were merely perfunctorily looked at. A Rhode Island Act of 1695 establishing an Admiralty Court was disallowed in 1704 because it assumed a jurisdiction not granted by Charter, and a Connecticut law against heretics in 1705, while the intestacy law of 1699 was judicially pronounced void in *Winthrop* v. *Lechmere*. The Board lamented the lack of control over Acts, and a Committee of the House of Lords in 1734[1] recommended that all colonies should be compelled to send home all their Acts in force for examination and disallowance of those unsatisfactory, and that in future all Acts must be sent home within one year and none, save on emergency, should have effect until approved. But this drastic step was out of the question.

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[1] West, 24 Mar. 1719 (Pennsylvania); Raymond and Yorke, 2 June 1722 (Chalmers, *Opinions*, i. 348–50). Northey A.G., 19 Oct. 1705, ruled that Penn could only disallow when in the colony.

[2] Pennsylvania Acts according to the Charter were to be disallowed under the privy seal. The validity of disallowance by Order in Council, questioned in *Hamilton* v. *Richardson* (1733), was asserted by local Act, but later the proper form was followed; A.P.C. v. 302 (1771), 398 (1774).

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[1] Cf. Raymond, 19 Aug. 1713 (Chalmers, ii. 1 f.).

[2] A Carolina Act for imposing duties on British goods was declared void in 1718 and two on religion in 1706; A.P.C. v. 88; ii. 506 f. A North Carolina Act exempting debtors in 1708; A.P.C. vi. 66; ii. 832. In 1737–8 Fane, Ryder, and Strange ruled that North Carolina Acts were nearly all void because never formally confirmed at the next biennial Parliament under the Constitutions, no. 83; Chalmers, i. 356; ii. 12. Hence power to declare void existed.

The subjects of disallowance were those indicated in the instructions[2] to the Governors, which showed the lines on which the Privy Council worked. The protection of the prerogative took various forms. The most important was the rule which insisted that changes in the representation of the people and in the duration of the legislatures should be strictly confined, to which allusion has been made above. A Maryland law to recognize the sovereign was denounced as officious and disapproved.[3] To extend the provisions of a royal charter was objected to in the case of Virginia in 1754.[4] To omit the right of visitation by the Governor when creating a college, as in the case of Harvard, entailed disallowance, and Virginian Acts to establish fairs[5] were rejected as encroachments on the prerogative, as was a South Carolinian Act in 1750 establishing commissioners of fortifications, and ousting the Governor's power. Incorporation was safeguarded from invasion by Acts, but the power to legislate was not denied,[6] save in so far as by Act of 1741 the provisions of the Bubble Act of 1720 were extended to the colonies. Objection was made to the entrusting to overseers of the poor by New Hampshire of the care of lunatics, as a royal prerogative, and instructions given in 1718 and in 1769–70 to delegate to the Governor as chancellor the power to grant commissions for the custody of lunatics.[1] Jamaica was refused the sovereign privilege of minting money in 1760, and New Hampshire of granting a monopoly in 1768.[2] Exception was taken to any dealing with the prerogative of pardon. The pecuniary interests of the Crown prevented North Carolina, Virginia, and New York legislating effectively on quit-rents, and priority of Crown debts was insisted on. Efforts to penalize royal officers were not allowed to stand; thus Pennsylvania was forbidden to compel customs officers to enforce payment of lighthouse dues, and New York was not allowed to prevent the Attorney-General prosecuting without authority of a Grand Jury or the Governor. Patent offices might not be abolished without compensation, and fees were protected from wholesale reduction. Naturalization laws were regarded with suspicion, though allowed as a rule to lie over, but a general prohibition of assent was given in 1773. Strong objections were expressed to efforts of Massachusetts, Barbados,[3] and South Carolina, as well as New York, to cut off the power of the Governor to issue warrants for expenditure, and a whole batch of similar Acts in Pennsylvania was denounced in 1760 as confounding the executive and the legislative, and destroying the royal prerogative. The same colony's militia Act was disallowed in 1755 for depriving the Crown of proper control over officers.

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[1] *Journals*, xxiv. 411. Cf. C.C. 1712–14, p. 373 (Northey, 22 July 1714).

[2] See pp. 248 f. *ante*.

[3] Harcourt A.G., 17 Sept. 1707 (Chalmers, i. 343).

[4] A.P.C. iv. 257.

[5] Ibid. 138 (1751); v. 162 (1768).

[6] West, 11 Apr. 1723, on Charleston charter (Chalmers, ii. 53); Massachusetts Act to propagate Christianity among Indians, 1762 (A.P.C. iv. 559), partly because of extra-territorial operation.

Laws were disallowed which conflicted with Acts of Parliament on matters of trade, navigation, coinage, or importation of convicts. Massachusetts Acts penalizing Quakers, forbidding appeals in real actions, and empowering the inhabitants of Rochester to take fish were disallowed *inter alia* as contrary to express charter provisions, as was the Act of Connecticut against heretics. A Jamaican Act increasing representation was disallowed in 1773 because it had no suspending clause, though re-enactment was permitted.

Conformity to the laws of England was insisted upon in matters of regularity of procedure and form. Hastily passed laws were sometimes refused acceptance. Vague phrases like 'devilish practices' or 'by common consent', and loose definitions in criminal statutes were reprehended, and all retrospective

[1] A.P.C. v. 189.
[2] Ibid. iv. 455; v. 159.
[3] Ibid. iii. 203 (1728); cf. West in Chalmers, ii. 12–17.

laws, or laws like the Massachusetts Acts penalizing Vetch and others for trade with the enemy in lieu of proceedings being carried out in the Courts.[1] Acts combining disparate subjects were censured, and irregularities in passing Acts might be fatal.[2] Criminal punishments of undue severity and encroachments on liberty were restrained. In 1734 a South Carolina Act was disallowed which declared a virtual suspension of Habeas Corpus, and sought to indemnify judges charged with illegal conduct. Violations of private right were resented, such as the lowering of interest on loans, the destruction of houses without compensation, or interference with rights of minor heirs. Regularity of procedure in case of private Acts was demanded on pain of refusal of sanction; efforts to settle dubious titles were rejected, if interests were dealt with without due opportunity of those affected to appear; attempts to render entails perpetual were disapproved. At first laws of inheritance were kept in accord with English law, but this was later abandoned. But the Board declined to approve any efforts to give new property rights to married women as against their husbands.

Judicial procedure was as far as possible regulated on English lines. Thus only in 1719 did Pennsylvania obtain sanction for the wide use of affirmation in lieu of oaths, and, to meet colonial needs, the English law itself was amended in 1722.[3] Affidavits were consistently objected to as means of proof generally. Exception was taken to the grant of excessive powers to small local courts; if New York was permitted to allow justices, mayors, and recorders to decide issues up to £5, it was not permitted to increase the limit to £10, nor was New Jersey. Appeals were not to be cut off from local courts, nor was New York allowed to increase to £50 the minimum limit of jurisdiction of the Supreme Court, as contrary to the trend of British jurisprudence. The grant of divorces by local Act without examination in an ecclesiastical Court or verdict in a common law Court was declared improper.

Matters affecting trade and shipping evoked firm action. At first colonial Acts were allowed to tax British imports if they contained a suspending clause and were not likely to injure British trade and shipping. In 1715 the New York tariff placed duties on all European goods, and Hunter was required to secure alteration, while in 1717[1] a general instruction was given to the Governors not to assent to laws affecting British trade or navigation, unless they contained a suspending clause. In 1718 the proprietors of North Carolina were ordered to repeal an Act imposing a 10 per cent. duty on British manufactures, and warned that the Charter was in jeopardy.[2] In 1720 a 2 per cent. duty imposed on European goods by New York, with a suspending clause, and a 3 per cent. duty in Antigua and Montserrat without such a clause, produced careful consideration. The Privy Council, overruling the Board, annulled the New York Act and a general instruction was sent forbidding any imposition on European goods imported in English vessels.[3] Efforts to evade, as by Massachusetts in 1752 when an excise was placed on retailers, were foiled. Differentiation directly against British shipping and British goods was forbidden in Massachusetts in 1718.[4] Export duties were permitted only if they did not hamper British manufactures and aid local producers; thus in 1771 a Georgian Act taxing the export of hides was disallowed on this score. Preference to colonial shipping by halving the imposts on liquors was disapproved in the case of a Virginia Act of 1730, and a general instruction was also given in 1732[5] not to allow differentiation; this was repeated in 1755 as a result of a South Carolina Act, so as to prevent higher dues being levied on ships or goods of non-residents than on natives of the province. Import duties on imported slaves were objected to when they were high, as tending to injure the Royal African Company and British shipping;[6] it was thought less objectionable if the importer was not to pay, but in 1770 it was realized—rather late in the day—that after all he was equally affected by the purchaser having to do so. Moderate dues only were approved in regard to convicts, and attempts to exclude either negroes or convicts were forbidden. The development of local manufactures was prevented as far as possible; in 1772 South Carolina was approved for offering a bounty for flax but censured for also giving one on linen, and in 1767 a Virginia Act, allowing a drawback on exportation of dressed hides, was disallowed as an express act for the promotion of an export manufacture. Maryland and Virginian legislation to establish ports and towns was frowned on, lest there should be established rival industries to tobacco-growing.

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[1] A.P.C. ii. 516 (1707). In 1759 a Jamaica Act of 1756 cancelling a conviction was disallowed; A.P.C. iv. 412.

[2] In 1710 it was pointed out that a Maryland Ordinance on licensing ordinaries was invalid without the Governor's assent; A.P.C. ii. 533.

[3] Cf. Georgia, 1756; A.P.C. iv. 407.

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[1] A.P.C. ii. 721; J.C.T.P. 1715–18, p. 263.

[2] A.P.C. ii. 740.

[3] Ibid. iii. 40, 849 (1724).

[4] Ibid. 759–60 (1719).

[5] Ibid. 348, iv. 308 f.

[6] Ibid. iii. 160–3 (1731).

The question of paper currency evoked slowly a clear policy of the Board[1] which recognized, if tardily, that the colonies had a legitimate grievance in the lack of a mint and in the regulation of their trade by Imperial Acts in such a way as to render it difficult to establish a favourable trade balance. It was agreed that the amount of bills issued should be limited to the minimum necessary for circulation; that full provision be made for refunding; that bills should be of limited duration and should not be reissued when retired; and that they should not be legal tender. A suspending clause was required in 1727 and again in 1740 in such bills. A large grant for war services enabled Massachusetts in 1749 to retire her excess bills, and in 1751[2] to meet difficulties in Rhode Island an Imperial Act applying to New England forbade the passing of legislation to extend the duration or depreciate the value of bills outstanding, and to prevent such bills being legal tender. In the stress of the war Virginia and Pennsylvania, New Jersey and Georgia were allowed to violate this doctrine. In 1764 Parliament[3] declared that no bills in any of the colonies could be made legal tender nor the period of legal tender of bills issued be prolonged after 1 September 1764. In this action the Board sought to consider equally fundamental colonial interests and the needs of the merchants, who were quite willing to allow the use of paper money if it could be preserved from rapid depreciation with all the evil effects on commerce.

The Board was insistent on disallowing Acts which were prejudicial to British creditors of American debtors. The Virginia and Massachusetts Acts of 1757 and 1762 allowing voluntary bankruptcy were disallowed[4] as affording too easy means of defeating creditors overseas, and other Acts were refused confirmation on this ground. Other laws favoured debtors by permitting payment in depreciated currency; a Virginia Act allowed payment in depreciated paper and was inadvertently confirmed, and it took ten years to secure its repeal.[1] A South Carolina Act of 1696 was disallowed in 1734 because it exempted immigrants for five years from arrest for debt, and so was a Georgian Act of 1757 which gave seven. Acts were disallowed which, as in Antigua or South Carolina, gave jurisdiction in debt claims to inferior Courts, where justice was improbable, and time limits were disallowed if unfair to overseas creditors. Attachment of property of absentee debtors was finally objected to, and an instruction given in 1771[2] forbade assent to bills making liable for execution in recovery of debts the estate, real or personal, of any person never having resided in a colony. In 1732,[3] as the result of appeal by English merchants, an Act of Parliament made lands, tenements, and negroes in the colonies liable for the payment of debts as in England, and applied to them the colonial rules in case of personal estate, while affidavits made in England were to be accepted as evidence in colonial Courts. In matters of inheritance, however, negroes remained real estate, and Virginia was refused permission in 1751 and 1763 to alter the rule, though South Carolina in 1740 by inadvertence, and Georgia in 1769, were allowed to make them personal in all matters. The regulation of foreign coin values by Imperial Act of 1708[4] was the base of repeated disallowance of attempts to vary these values, for British mercantile theory regarded over-valuation as distinctly disadvantageous to British commerce and revenue.

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[1] Russell, *Am. Col. Leg.*, p. 121.

[2] 24 Geo. II, c. 53.

[3] 4 Geo III, c. 34. Modified for New York, 10 Geo. III, c. 35; 13 Geo. III, c. 57.

[4] A.P.C. iv. 388, 563. Repudiation favoured revolt; Van Tyne, *Causes of War of Indep.*, p. 426.

One important service rendered by the Board was the prevention of intercolonial prohibition. In 1709 a law of North Carolina levying taxes on Indian traders from Virginia trading with the Indians to the south and west was ordered to be disallowed, and, when it was attempted to re-enact it as an export duty, on the theory that the Virginians passed through North Carolina, it was equally rejected in 1713.[5] A Massachusetts Act of 1721 imposing retaliatory duties on New Hampshire was disapproved in 1725 on the ground that the proper method of dealing with unfair taxation of one colony by another was disallowance of the offending laws, not retaliation.[1] In 1735–6 when Massachusetts excluded New Hampshire bills of credit disallowance was proposed. In 1731 representations from North Carolina against import duties on tobacco imposed under Virginian Acts of 1705 and 1726 secured orders for their disallowance.[2] In 1757 North Carolina was assured of the necessary action to forbid taxation by South Carolina, which in turn was protected in 1736–8 against impositions by Georgia. It was, of course, impossible to attempt a régime of intercolonial free trade at a time when indirect taxation was an essential mode of revenue-raising, but at least deliberate hostility could be checked. The natural attitude of the colonies in this matter was one of selfishness. Despite her needs Virginia could not tax ships entering or leaving Chesapeake Bay for the erection of a lighthouse because of Maryland's claim to exemption under her Charter[3] in 1728 and 1759; when she did so in 1772 it was by Dunmore's assent to a bill without the suspending clause which was required by his instructions.

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[1] A.P.C. iv. 389.

[2] Ibid. v. 320.

[3] 5 Geo. II, c. 7.

[4] 6 Anne, c. 57.

[5] A.P.C. ii. 611–14.

In regard to Indian trade also the Board's action was valuable. A New York set of Acts since 1720 was disallowed in 1729,[4] as was a Virginian Act of 1714 in 1717, because of efforts to engross Indian trade,[5] and South Carolina in 1738 was not allowed to monopolize trade with the Creeks and Cherokees.

In certain cases the chief motive of the Crown was not regard for Imperial prerogative, trade interests, or conformity to English law, but merely the advancement of the colonies. Thus lotteries as a source of providing such utilities as paving for the streets of Philadelphia raised concern for their effect in producing dissipation, and though the particular Act was not disallowed as spent, a general instruction against establishing lotteries without royal approval was given in 1769.[6] It disapproved efforts unduly to depress rates of interest as disastrous to colonial progress which needed capital. It disallowed Virginian and New York measures which allowed excessive accumulation of lands, and, while it objected to laws of North and South Carolina as to quit-rents on other grounds also, it censured the tendency to prevent settlement.

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[1] Mass. *Acts and Resolves*, ii. 235.

[2] A.P.C. iii. 345 f., 512–14.

[3] Ibid. iv. 401; J.C.T.P. 1723–8, pp. 440 f., 443.

[4] A.P.C. iii. 209–14. The Acts were held to injure English trade though intended to hamper Canada and secure the Indian trade.

[5] Ibid. ii. 721.

[6] Ibid. v. 188.

Equally in the interests of the colonists was the broad-minded patronage of religious toleration. The royal period in Maryland saw the disallowance of three Acts between 1692 and 1700 which enforced the use of the Book of Common Prayer and the Anglican sacrament, taxing Catholics and Quakers for the support of the English Church, and a moderate measure substituted. In 1706 was disapproved an Act directed at ministrations by Catholic priests, though suspended by a second allowing toleration for private devotions for eighteen months, on the ground that it would banish Catholics from the province,[1] and the time limit for toleration was ordered to be made indefinite. Quakers in Virginia secured the disallowance in 1718 of an Act of 1663 which forbade their importation or assembly for worship on pain of banishment for a third offence. Religious equality under the Massachusetts Charter was enforced by disallowing in 1724 Acts taxing Quakers in Dartmouth and Tiverton for support of Congregational ministers, though there they were in a majority. Anabaptists procured protection in 1771.[2] In Virginia the Bishop of London's intervention was in part responsible for the disallowance of the famous Act of 1758 in Virginia providing for payment of ministers' salaries of 16,000 lb. of tobacco at 2*d.* a pound, the real value being nearer 6*d.* The disallowance was the theme of Henry's distinctly unjust attack on the Crown in the *Parson's Case* when he assailed action as a breach of the covenant between sovereign and people.[3] But toleration had limits: full freedom to Catholics in West Florida was forbidden, as contrary to the general practice in the Dominions, and a Presbyterian College in North Carolina was deemed too much like encouraging dissent.[4]

The effect of disallowance was essentially that of the repeal of an existing law, and the term repeal often occurs in official terminology. This is shown by the view that disallowance took effect from notification, and not *ex initio*, though that was vainly contended for the claimant in *Camm* v. *Hansford* as regards the annulment of the Virginia Act of 1758.[1] This fact, of course, told in favour of the colonies when they could induce a Governor to disobey or misinterpret instructions, as an Act might then come into force and have its effect, if temporary, before it could be disallowed. Thus in 1718 Massachusetts penalized British goods and ships by a temporary Act, and the Governor was told expressly not to allow any re-enactment of such a measure.[2] A Jamaican annual Act was disallowed in 1748 as discriminating in taxation against absentee owners. Pennsylvania used this device with great success, but elsewhere it was of minor importance, as courts could not be created, the constitution of the legislature changed, or private property disposed of, by temporary measures. More effective was prolonged delay in sending over Acts; in 1742 for a decade only six Acts had come home from New Jersey, and in 1754 New Hampshire had sent nothing for two and a half years. In 1768 Hillsborough urged earlier transmission on New York and Virginia among others. Tacking sometimes succeeded; thus Pennsylvania issued in 1760 by one Act bills of credit and authorized a private loan. Re-enactment after disallowance was Pennsylvania's great weapon;[3] it attempted thus to wear out the royal resistance to its system of inferior courts, its preferences to colonial debtors, and desire for juries even in Admiralty courts. Nor could West in 1719[4] do anything but admit that the Charter did not forbid re-enactment, and no means existed of enforcing the prohibition, as the Governors of that colony were not subject to royal instructions. Bermuda offended the Board by providing for 4 per cent. import duties on goods after disallowance of an Act imposing 5 per cent., adding insult by reducing the duties to 2 per cent. for Bermudans.[5] New Jersey in this way sought to reduce the fees in the Secretary's office, and North Carolina to establish unsatisfactory means of proof of wills.[1] Occasionally a disallowance never was notified to the colony or was not acted on: Danvers in Massachusetts continued to send representatives though the Act of 1757 was disallowed in 1759, and a New Hampshire Act on the custody of idiots of 1718, though disallowed, remained operative until re-enacted and disallowed in 1769. A Virginia Revenue Act of 1680 though disallowed was operative until 1707.

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[1] C.C. 1693–6, p. 636; 1700, p. 11; 1701, pp. 26, 78, 211, 300; A.P.C. ii. 497 f.

[2] A.P.C. iii. 491; v. 323.

[3] See p. 284 *ante*.

[4] A.P.C. v. 286, 338. Cf. protection of Jews in Jamaica; A.P.C. iii. 487–9 (1735–6).

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[1] See p. 249 *ante*. Repeal by proclamation of the Governor was ordered in Virginia in 1686 and carried out, but this was criticized and not normal; A.P.C. ii. 142 (1689). Governors sometimes delayed notification of disallowance. Partial disallowance or change occurred in the case of the Barbados and Virginian revenue Acts of 1663 and 1680 and a Barbados private Act (A.P.C. ii. 265) in 1694, but was illegal; Harcourt and Montague, 23 Dec. 1707 (Chalmers, i. 357–9), though suggested again in 1760; A.P.C. iv. 440.

[2] A.P.C. ii. 760.

[3] Root, *Pennsylvania*, pp. 159–74.

[4] Chalmers, *Opinions*, i. 348 f.

[5] A.P.C. iii. 70 f. (1723–5).

There were, no doubt, objections to the process of review; the colonies were left for considerable periods in ignorance of the fate of laws, and the slowness of Board of Trade procedure—often due to the delays of the Law Officers and other departments—was a real grievance where laws with suspending clauses were concerned, more especially as their expedition meant fees, if not also *douceurs*. There is conclusive evidence that it was believed by Penn and many others that substantial sums would secure passage of Acts through their vicissitudes in London. Repeals often caused difficulties, as in the case of the scheme for a Massachusetts land bank[2] and the bankruptcy Act, or the refusal to allow Pennsylvania its system of Courts. The numbers disallowed were considerable: of 8,563 Acts submitted 469 or 5·5 per cent. were disallowed in the case of the continental colonies, Pennsylvania faring worst with 15·5, and Massachusetts best with 2·8 per cent. Moreover, in some cases strict adherence to instructions, as in the case of a Virginia proposal to preserve cattle from a prevailing disorder, gave colour to the complaint in the Declaration of Independence that the King had 'forbidden his Governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended he has utterly neglected to attend to them'. But on the whole the action of the Board was effective in bringing about some conformity to sound principles of law and order, in carrying out the system of the laws of trade and navigation, and preventing rash constitutional experiments, intercolonial tariff wars, and violation of the laws of religious toleration. The accusations of the Declaration of Independence are so wide as to be misleading and unjust. It is impossible to regard as 'laws most wholesome and necessary for the public good' the imposition of duties on imported negroes and convicts, nor, if the Board controlled naturalization, did it obstruct immigration. Its efforts to prevent depreciation of currency and evasion of debts struck a note in American feeling ultimately, for repudiation of contractual obligations is forbidden to the States by the constitution. Moreover, its whole scheme of control of popular legislatures by outside authorities is adopted in the constitutions of the States and the federation, where the sovereign power of an elected assembly to legislate at pleasure is more absolutely negated by far than it ever was by the Board of Trade. Its refusal to allow judges to hold during good behaviour was a counterpart to the refusal of the Assembly to render them independent by granting them permanent salaries, and the judicial system of the United States has suffered from the failure of a settlement.

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[1] A.P.C. iii. 343 (1731), 454 (1735); iv. 502 f. (1761).

[2] Ibid. iii. 683–5; Osgood, iii. 540 ff.

2. *Imperial Trade Legislation.*

It is characteristic of the period that, while there was a fair amount of Imperial legislation regarding the colonies, it practically all dealt essentially with trade questions. The question of extra-territorial custody which gives rise in the nineteenth century to such Acts as the Extradition Acts, 1870 and 1872, the Fugitive Offenders Act, 1881, and the Colonial Prisoners Removal Acts, 1869 and 1884, had not presented itself, and issues such as the control of foreign enlistment were not actual. But the policy of trade control rendered it necessary to enforce British interests in a variety of ways.

The policy of the Act of 1696 remained unbroken, and resulted in further additions to the list of enumerated goods which must be sent to Great Britain or the colonies. In 1705 rice and molasses were added, as well as naval stores on which a system of bounties was supplied. In 1721 beaver and other furs and copper ore were added, while, on the other hand, in 1705 the export of linen direct from Ireland was permitted, and in 1727–30 Pennsylvania and New York were granted the boon of direct importation of salt.[1] The enumeration of rice resulted in the loss of the Portuguese trade, and in 1721 the Board of Trade recommended that a system of licences should be prepared, under which rice might be sent direct to parts of Europe south of Finisterre subject to a call being made in England *en route* home, and in 1730 the entreaties of the Carolinians prevailed, to be followed in 1735 by a similar concession to Georgia.[1] Duty had to be paid in Great Britain on the same basis as if the rice had been imported and then exported, with the normal drawback; the return in 1763 reached about £3,000, and the duty was, therefore, a pure revenue duty. Another duty payable in the colonies was imposed by an Act of 1707,[2] which provided that, where European and other goods were condemned as prize in the colonies, they should be liable to such a duty as would have been due on importation into England less the drawback on export; some revenue was drawn thence during the war, and again in 1730, but in 1739–48 nothing was received by the British exchequer. The duties from the Act of 1673 were also very small, and practically derived from the West Indies only, owing to the assignment of revenue to the William and Mary College in Virginia.[3]

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[1] 2 & 3 Anne, c. 5; 3 & 4 Anne, c. 4; 8 Geo. I, cc. 12, 15, 18; 13 Geo. I, c. 5; 2 Geo. II, c. 9.

Much more important historically was the Molasses Act of 1733[4] which imposed heavy duties, intended to be prohibitive, on rum, sugar, and molasses, if of foreign origin, in order to stimulate the trade of the British West Indies. Despite the efforts of the West Indian interest to secure this legislation it turned out of minor importance to the islands, which found their real objective in the permission obtained in 1739[5] to export direct to Europe, at first only in British shipping, but in 1742 also in colonial shipping. Efforts to secure modification of the Molasses Act were made by the West Indian colonies, when they discovered the extent of the disregard actually shown of the Act in the continental colonies, but nothing came of these suggestions, and an Act of Jamaica in 1752 to forbid importation of foreign rum, molasses, and sugar was disallowed in 1762 as contrary to the Act of 1733.

The campaign against colonial manufactures was continued and extended on representations of Coram among others to hat making. Export to any colony was forbidden in 1732;[6] no person might make hats unless he had served an apprenticeship of seven years; not more than two apprentices could be taken at once; no negroes could be employed. The Act like that of 1699 as to wool was not effectively carried out in the absence of any provision for special officials, but there is no proof that it was wholly disregarded. In 1750[1] bounties were granted on bar and pig iron, and on the other hand the higher processes of manufacture of iron and steel were prohibited, including the use of any mill or engine for slitting or rolling iron, or any plating forge to work with a tilt-hammer or any furnace for making steel. The Governors in this case were ordered to take active steps under penalty of £500 fine to carry out the Act, but reports sent show that there was little activity even in Pennsylvania and New York, which were alleged to resent the prohibition. The truth was that in the social conditions of the colonies manufactures were premature and the bounties offered doubtless were sufficient compensation. But the frank exposition of the doctrine of the right to suppress colonial manufactures in British interests sent by the Board of Trade to Massachusetts in 1756[2] was hardly likely to commend itself to the manufacturers of linen there merely by the argument of the cost to the British exchequer of colonial defence.

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[1] 3 Geo. II, c. 28; 8 Geo. II, c. 19.

[2] 6 Anne, c. 37, s. 11.

[3] Stock, ii. 353.

[4] 6 Geo. II, c. 13; Pitman, *Brit. W. Indies*, pp. 242 ff.

[5] 12 Geo. II, c. 30.

[6] 5 Geo. II, c. 22.

While discouraging competitive manufactures the Board was eager to direct the minds of the colonists to the advantages of the production of naval stores, in the perpetual desire not to depend too heavily on the Baltic powers. Substantial bounties were accorded, therefore, in 1705,[3] accompanied by the enumeration of these stores—tar, pitch, rosin, turpentine, masts, yards, bowsprits, and hemp. At the same time the destruction of small pine trees, fit for the production of pitch and tar, in the New England colonies, New York, and New Jersey was forbidden. This enactment was strengthened by an Act of 1711,[4] which extended to the Delaware and penalized the destruction of white pine trees of the dimensions stated in the Massachusetts Charter if not on the property of a private individual. But neither this Act nor the Massachusetts Charter availed to help Bridger, who from 1705 to 1715 carried out the onerous duties of Surveyor-General of Woods. In Massachusetts it was ignored that the

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[1] 23 Geo. II, c. 29.

[2] Beer, *Brit. Col. Pol.* 1754–1765, p. 205.

[3] 3 & 4 Anne, c. 10; 12 Anne, c. 9.

[4] 9 Anne, c. 17.

Charter reserved trees on land not granted before 1691 to private persons, and, apart from that, any grant to a township was deemed to be a grant to private persons. In 1722[1] the bounty on naval stores was renewed, and the Act expressly provided that white pine trees on land outside townships might not be felled, and, to enforce the rule, gave jurisdiction to Admiralty Courts. New England ingenuity got over the prohibition by arguing that the Act was permissive, and meant that in townships there might be cutting at pleasure, and New Hampshire hastened to proclaim townships on every side. In 1729[2] an effort was made to stop this, by providing against the cutting of white pine trees on any land even within a township unless it belonged to a private individual, but this had no real effect. Dunbar, though made Lieutenant-Governor of New Hampshire in the hope thus more effectively to do his work as Surveyor-General, was perpetually repressed by Belcher, his superior as Governor, and failed hopelessly, despite his manful efforts, to protect the forests. Tar and pitch were, however, produced in large amounts in the Carolinas, whence New England procured them in return for rum, molasses, and other goods, an interesting example of the circuitous course of colonial trade. The trouble of procuring the Surveyor-General his salary, the interminable disputes in the colonies, and the negligible results effected, at last deprived the Board of interest in the topic, which virtually lapsed.

A far wider and more exciting sphere of interest was the question of bills of credit. The habit of issuing such bills was started by Massachusetts in 1690, and in 1715 Hunter of New York accepted one in order to obtain a permanent revenue. In 1717 another Act was passed and, as the bills were in private hands before it could be disallowed, the Board allowed it to stand, but laid down the rule that no such bill should in future be passed unless it had a suspending clause, or gave a permanent revenue.[3] The last clause was used by New Jersey in 1723 to cover an issue and other colonies followed its example, while in 1735 the Board instructed the Governor of Massachusetts that he would be at once recalled if he did not insist on a suspending clause save under strictly limited conditions. Finally it was recognized that the matter was beyond mere instructions, and in 1751 the issue of bills was controlled in New England, and in 1764 in all the colonies, though unhappily nothing was done by Parliament either to establish a mint or found a bank to provide a suitable measure of credit. The kindred issue of the rates at which foreign coin was to pass current was dealt with first by proclamation of 1704, and, when this was disregarded, by Act of 1708; but, despite instructions to secure that the Act was observed, its efficacy seems to have been limited.

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[1] 8 Geo. I, c. 12. See West (1718), Fane, Yorke, and Talbot, 1726; Chalmers, i. 110–20.

[2] 2 Geo. II, c. 35.

[3] A.P.C. ii. 739. Cf. an order in 1706 on a Barbados Act, ii. 510.

Regard for the interests of British merchants dictated an Act of 1732 which provided a means of proving debts in the colonies by affidavits made in England, and rendered land, tenements, and negroes liable for debts, and applied to them the forms of proceedings in the local Courts applicable to personal property. The intervention in internal law was marked, but was in some measure justified by the difficulties of recovering debts in colonial Courts, and the resulting injury to colonial credit which enhanced prices to the colonies and rendered trade difficult.

The interests of Imperial trade led also to the establishment by Act in 1710 of a postal system, the right of free ferriage being conferred. As early as 1718 we find Spotswood writing that there was opposition in Virginia, and that 'the people were made to believe that the Parliament could not lay any tax (for so they call the rates of postage) on them without the consent of the General Assembly'. But the manifest advantage of the service seems to have stifled serious objection.[1]

More directly political, but intended mainly for the purpose of aiding the immigration and settlement of useful foreign Protestants, was the enactment in 1740[2] of legislation as to naturalization. The common law of England, carried to the colonies, prevented an alien from holding land unless naturalized or made a denizen by prerogative act. Moreover, the Navigation Acts of 1660 and 1696 forbade an alien to act as a merchant or factor in the colonies. The colonies, however, assumed early that the Governor might grant letters of denizenship,[1] and that local Acts could give the quality of a British subject locally, for it was early ruled that the effect of such legislation was purely local.[2] The validity of these measures[3] was dubious in the view of the Board, and the Act of 1740 permitted naturalization of persons resident seven years, without being absent for more than two months at one time, on taking the oaths of allegiance and supremacy, subscribing the declaration against transubstantiation, and receiving the sacrament if not Jews or Quakers in a Protestant and reformed congregation; Pennsylvania was permitted in 1746[4] to allow non-Quaker Protestants to subscribe to a declaration of fidelity as the Quakers were permitted to do.

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[1] A patent of 1692 to T. Neale was followed by local legislation. See Smith, *Hist. of the Post Office in N. Amer.* (1920); 9 Anne, c. 10; Beer, *Brit. Col. Pol.* 1754–1765, p. 34. For disallowance of a North Carolina Act in 1772 see A.P.C. v. 343.

[2] 13 Geo. II, c. 7.

Of minimal importance in itself, but productive later of friction, was the extension by an Act of 1729[5] of the obligation imposed on English seamen by an Act of 1696 of making a contribution of 6*d.* monthly to the funds of Greenwich Hospital, whose benefits were available for colonial seamen and to which accordingly it was felt proper that they should contribute.

Imperial legislation indirectly, but in very important ways, also affected the colonies by the grant of important preferences as on sugar, tobacco, rice, indigo, and naval stores; of direct bounties; and of large drawbacks on exports of European or African products, all steps beneficial to the colonies. The continued prohibition of tobacco-growing secured colonial tobacco a ready market, and the Imperial control of sea routes gave a considerable measure of safety of transit, far superior to anything possible by colonial effort. On the other hand, colonial opinion resented the unrestricted power of Imperial taxation on colonial exports to Great Britain; the Virginia Committee of Correspondence bade their agent protest against the addition in 1759 of 1*d.* a pound to the tobacco duty as a great grievance to the people, ignoring the fact that the consumer was largely the sufferer. This wide authority contrasted with the strict rule now generally enforced against any attempt of the colonies to impose taxation of British manufactures, especially as the navigation system, on the whole, rendered it not easy for European goods to compete with British, and practically impossible when, as in the case of manufactured iron and steel, cordage, sail-cloth, and paper, no drawback was allowed on export.

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[1] This was forbidden in 1700; A.P.C. ii. 348; C.C. 1700, p. 34.

[2] Thomson S.G., 5 Mar. 1719 (Chalmers, *Opinions*, i. 343 f.).

[3] Virginia from 1671, 1680, and 1707; New York from 1683 and 1715; South Carolina from 1697, 1704, and 1712.

[4] A.P.C. iv. 21.

[5] 2 Geo. II, c. 7; Beer, *Brit. Col. Pol.* 1754–1765, p. 288; A.P.C. ii. 814 (1731): instructions for collection.

One change, however, in this period was of prime importance, the Act of Union of 1707[1] between the two kingdoms, which removed at once all barriers between the colonies and Scotland, leaving Ireland in an unfavourable position. The Act at once terminated the campaign against Scotsmen which had marked much of Randolph's activities, and it ended the illegal trade with Scotland which the Scottish government took no pains to disturb.[2]

3. *Judicial Appeals*

The right of the King in Council to hear appeals from any dependency was effectively recognized and controlled only in the eighteenth century, though the principle had been asserted by Charles II in his grants to the Duke of York in 1664 and 1674 and to Penn in 1681, and by implication in the Carolina grant. The claim, of course, cannot be traced with Pownall[3] to the peculiar relation of the King to the Channel Islands as relics of the Duchy of Normandy and, therefore, subject only to the King and not to Parliament.[4] Triers of petitions from Guernsey *inter alia* were appointed in Edward I's reign and later, and it was probably merely the intermission of Parliaments which encouraged reliance on the King in Council. The possibility of control by other Courts was negatived by the Order in Council of 1495 that appeals should henceforth lie to the King in Council only and not to any other Court. Rules for appeals from Jersey were laid down in 1572 and repeated in 1671; in them the fundamental principles appear that there must be a judicial decision, and that the appeal is to be brought within a fixed time and the whole proceedings of the Court below are to be made available. In 1580 it was laid down that criminal appeals would not be heard. As we have seen, the commissioners of 1664 in New England went out with instructions to claim the right to hear appeals, and in *Jennett* v. *Bishop*[1] in 1683 North definitely laid it down as a matter of general law that an appeal lay to the King in Council from places held under royal grant.

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[1] 6 Anne, c. 11.

[2] The Act 12 Geo. III, c. 20, providing for conviction of persons standing mute on arraignment for felony or piracy applied to the American colonies; 13 Geo. III, c. 14, validated mortgages of West Indian colonial estates to foreigners.

[3] *Admin. of the Colonies*, p. 82.

[4] Macqueen, *House of Lords*, pp. 682 ff.

The first precise statement of conditions of appeal is that contained in the first commission for New Hampshire in 1679, where the right to appeal is given in real and personal actions of a value above £50; in criminal cases if punishment were to extend to life or limb (save for wilful murder) the accused was to be sent to England or respited and his case referred to the King in Council. This last provision was evoked, no doubt, by the special and very rudimentary conditions of the colony and did not become part of the normal law. In civil cases the appellant was to give security for costs if he lost the appeal. A general Order in Council of 23 January 1684 made it clear that security must be given both in the colony and at the Board to prosecute effectively, and carry out, the decision of the King in Council; it was issued because in a New Hampshire case the security had not been taken. The commission to Andros for New England in 1686 dealt with appeals by fixing the limit as over £300, requiring appeals within fourteen days, security by the appellant, and no stay of execution, while the Massachusetts Charter of 1691 contains like provisions with the addition that the appellee must give security if execution is to proceed. In 1697 the judicial system of Virginia was remodelled by abolishing as irregular the appeal from the Governor in Council to the General Assembly; appeal was to lie to the King in Council as in the case of Massachusetts. The royal colonies clearly were not prepared to dispute the right to hear appeals, but in the case of *Hallam and Palmes*[2] in 1698–1701 the Privy Council absolutely insisted on allowing an appeal from Connecticut, which remained steadfast in denying the justice of such interference with its rights of jurisdiction. Against Rhode Island it was alleged by Bellomont in 1699 and Cornbury and Dudley in 1705 that it had denied appeals, and in 1705 two cases were mentioned, *Brinley* v. *Dyer* and *Brenton* v. *Walley*, while Bellomont seems to know the first; but the colony denied the charge, though in *Hutchinson* v. *Fones* in 1704 it unquestionably evaded an appeal by ordering a rehearing.[1] In point of fact an Act of 1666 contains definite reference to the right of appeal to the Privy Council as existing, doubtless an allusion to the readiness shown by the island to allow appeals to the commissioners in 1664–5. At any rate in 1706 an Act was passed again recognizing appeals, without fixing a minimum, which was, however, placed at £300 in 1718, and varied subsequently until in May 1776 the Courts were no longer declared to be King's Courts.

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[1] 1 Vernon 264 ff. Cf. *Fryer* v. *Bernard* (1724), 2 P. Wms. 262.

[2] A.P.C. ii. 328–30, 453 f.

As regards the colonies generally an instruction of 1689 provided that appeals were not to be allowed unless the matter at issue were of the value of £500, a figure distinctly high; moreover, as the decision as to the value lay with the Governor, he could prevent an appeal by ruling that the land or negroes or other matter at stake was not of the due value. Hence sprang the practice of petitioning the King to allow an appeal in a case where the Governor refused it. On 28 July 1726[2] the next general rule was issued, as a result of cases from Rhode Island in which, execution having taken place, the appellant's victory proved barren; by an instruction execution was to be suspended unless security were given by the appellee to make restitution if the appeal succeeded. On 4 February 1746 the rules were codified; the limit was above £500; appeal to be brought within fourteen days; security to be given by the appellant; execution to issue only if security were given by the appellee; it was added that an appeal was to be allowed 'where the matter in question relates to the taking or demanding any duty payable to us, or to any fee of office, or annual rent, or any such like matter or thing where the right in future may be bound . . . though the immediate sum or value appealed from be of less value'. This proviso was an important modification of a too rigid limit, and obviated the necessity of a petition[3] for special leave to appeal. The instructions of 1746 were, strictly speaking, intended to deal with the appeal from the Governor and Council as a Court of Error, but by analogy they were applied to the Governor as a

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[1] A.P.C. ii. 328, 495, 743, 747 f.; *Am. Hist. Ass. Rep.* 1894, pp. 334 ff.

[2] A.P.C. vi. 162.

[3] e.g. A.P.C. ii. 516 f. (Maryland: out of time). The number of appeals in 1720–70 increased from 87 in the first decade to 134 in the last; A.P.C. vi, p. xxxi.

Court of Chancery[1] and as Ordinary. One further elucidation was given of the nature of the appeal; in 1764 Colden claimed that he could admit an appeal to himself in Council from the judgement of an inferior Court founded on the verdict of a jury, which implied that an appeal would then have lain in such a case when decided by the Governor in Council to the King in Council. But the Board of Trade on 24 September 1765 pointed out that down to 1753 it was made clear by the commissions that appeal lay to the Governor in Council in cases of error only, and that the omission of the words in that year was solely due to the assumption that they were inevitably understood. The commission to Moore as Governor, therefore, was worded to restrict the appeal to cases of error, thereby reaffirming the principle applicable to appeals from the Governor in Council to the King in Council.[2]

The work of hearing appeals was referred by Charles II's order in 1668 to the Standing Committee of the Council for Trade and Foreign Plantations, aided by the Attorney-General or King's Advocate. In 1687 all the Lords of the Council and not a specified number were appointed to the Standing Committee, and on 10 December 1696 hearings were given to a Committee of the Whole, with a quorum of three, and this practice was followed under George I, George II, and George III.[3] The procedure, therefore, involved a report to the King in Council, which formally confirmed the recommendation and thus decided the case. When this had happened, a rehearing was impossible, unless indeed fraud were established or new evidence brought to light, a principle laid down in *Penn* v. *Baltimore*.[4] Further, the nature of the report rendered it necessarily unanimous, as was formally ordered for all Privy Council business on 20 February 1628.

Though the hearing of appeals from law courts was essentially a judicial function of the Council, it did not hesitate to make use of the Board of Trade for advice where any point of administration arose, and on such references the Board followed its own procedure of reference to the Law Officers, advising in due course the Committee of its view. But a more important part of its functions was perhaps advice as to whether an appeal should be admitted when leave was specially asked for.[1] Such applications clearly involved many considerations not strictly legal, and the Board's advice was invaluable. The right to grant special leave[2] was always insisted on by the Council; laws of New Hampshire and Maryland were disallowed in 1706 and 1711, and an attempt by the Bahamas to create a special Court without appeal to the Crown in Council was pronounced in 1772 altogether inconsistent with the constitution of the colony.

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[1] A.P.C. ii. 685.

[2] *Forsey* v. *Cunningham*, A.P.C. vi. 419 f.

[3] A.P.C. i. 456 f.; ii. 310.

[4] (1750) 1 Ves. Sen. 444.

The Council, it has been suggested,[3] 'in considering an appeal did not pass upon the merits of the case, but only upon the regularity of the procedure in the lower Courts'. This is clearly a misunderstanding; the Council was concerned fully with both aspects of any case, namely the technical regularity of the procedure and the soundness of the law expounded. As a court it could not be moved by mere expediency like the Board of Trade, but it dealt essentially with the merits in all those cases which were not decided on points of procedure, just as the Privy Council now does. Thus it was by it that Allen's claims to the ownership of the land of New Hampshire was disposed of finally in 1708, the appeal having been admitted on the advice of the Board of Trade in 1701.[4] Efforts were honestly made to arrive at a fair decision in the claims of the Mohegan Indians against Connecticut and Massachusetts, but without much result.[5] In *Torrey* v. *Mumford*[6] in 1734 the meaning of the term 'orthodox' as applying to a minister in Rhode Island was authoritatively laid down as covering a Presbyterian minister. In 1737–52 the same piece of land as was involved in that case formed the subject of *McSparran* v. *Hassard*,[7] where it was sought to prove that an Anglican clergyman could be deemed orthodox; the Council very fairly ruled that, while the term would naturally cover such a clergyman, the whole circumstances proved that no such meaning was attached by the original purchasers of the land who set it apart for religious ends. Valuable decisions were rendered in the complex issues of law generated by depreciated currency in its bearing on contracts, especially when made between persons of different residence. Efforts were made to redress injustice meted out by colonial Courts to London merchants. By the use of the discretion to allow appeals where they had been refused on the score that the amount was under the appealable value, it was possible in *Merrill* v. *Bow*[1] to do justice in a land difficulty arising from the Massachusetts–New Hampshire boundary issue. An amusing case concerned the dismissal of two professors of William and Mary College for dismissing an usher and refusing to allege a reason; as they had not been heard in their defence, their appeal was allowed.[2] But there was no tendency lightly to interfere with lower Courts; and in the case of Brown of Maryland in 1724 the Council declined to hear an appeal,[3] unless the petitioner first exhausted his remedies in the colony, a doctrine steadily adhered to.

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[1] A.P.C. ii. 238.

[2] Ibid. ii. 633 (1711); v. 329 (1772). In religious cases appeal was always possible (New York, 1713: A.P.C. ii. 665).

[3] See Dickerson, *Am. Col. Govt.*, pp. 280 f.

[4] A.P.C. ii. 367.

[5] Ibid. iii. 531–9; iv. 460 f., 723 f.; v. 218; vi. 538.

[6] Ibid. iii. 404.

[7] Ibid. 390, 529 f.

The weakness of the Council occasionally betrayed itself, most obviously in the case of *Leighton* v. *Frost*,[4] where a decision of 1735 in favour of the appellant was still unexecuted by Massachusetts in 1743. This contumacy is probably explained by the nature of the issue, which involved the detested right of the Crown to trees in the colony suitable for masts, as provided in the Charter of 1691.

Criminal cases were not normally entertained, though the instructions allowed appeals where the fine for misdemeanours was £200.[5] When a petition was presented in 1702 asking for an appeal in *Bayard's* case against his conviction of treason under an Act of the legislature of New York, which was declared to have gone beyond justice in its definition of the crime, the Council decided that Lord Cornbury should be entrusted to secure a reversal of the Act because it had been passed under a misunderstanding.[6] An appeal on behalf of Charles Arabella, a Florentine, punished for blasphemy in Maryland in 1710, was met by advising clemency.[7]

As already mentioned, in the famous case of *Winthrop* v. *Lechmere* the Council pronounced invalid a Connecticut law of intestacy as contrary to English law. Though the decision was afterwards reversed on the merits, the principle was fully appreciated in the colonies and at home, as is shown by the reference to it in *Camm* v. *Hansford and Moss*[1] in the Virginian General Court on 10 April 1764, and on appeal in the plea of Norton and Willes. In the case itself the appellants sought to have the Virginia Act of 1758 as to ministers' salaries declared void *ab initio*, since it was disallowed in 1760, while the defendants successfully contended that the Act was rendered null and void only from the publication of the disallowance.

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[1] A.P.C. iv. 239–43. [2] Ibid. iv. 530. [3] Ibid. iii. 60.

[4] Ibid. 461–70. Cf. *Keeling's* case, Barbados, 1771–6; A.P.C. v. 325–7.

[5] See, e.g., A.P.C. iii. 60–2; ii. 521 f. (special leave).

[6] A.P.C. ii. 412–14.

[7] Washburne, *Imp. Control of Adm. of Justice*, pp. 44 f. Cf. A.P.C. ii. 775 (B. Cook, Barbados, 1720); v. 203 (Brislane, Montserrat, 1773).

4. *Complaints*

Closely akin to appeals was the investigation entrusted by the Council to the Board of Trade of complaints of all kinds, received from colonists and people in England. They dealt with defects in the colonial constitutions, the operation of unjust laws, or the misconduct of officials.[2] The procedure followed was to obtain full written statements with documents, which should be authenticated if coming from the colony by the colonial seal; then these were communicated to the person whose action was implicated for observations; facilities were given for obtaining copies of papers, and, when the defence was ready, it was sent to the complainant, who might be permitted further time to supply proofs. Ultimately there was a formal hearing with the parties present or by agents, while counsel could be heard. On it the Board based its report, which, like any other report, could be opposed by counsel before the Committee of the Council. The final result was an Order in Council. But the procedure was clearly ineffective; as Stanhope observed in 1715, there was no means of compelling witnesses to come to London, and, if they gave testimony locally, it was the Governor himself who would have to authenticate it, a condition hardly giving much probability of obtaining testimony. Further, the cost was ruinous. None the less the Board persevered in its work on accusations against Governors, as in the case of Fletcher, though usually with indecisive results.

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[1] Washburne, p. 188.

[2] A short list of complaints of Governors is given A.P.C. vi. 628 f. For the case of Douglas of the Leeward Islands see ii. 652, 688–90; of Lowther of Barbados, 776–8; prosecution of both was ordered. Melville of Grenada was exonerated; v. 221–7 (1769). Cf. for Popple of Bermuda, A.P.C. ii. 63 ff., 83 f., 229 f.

5. *Boundaries*

The work of preparing briefs for the Imperial government on boundary issues with foreign States fell essentially on the Board of Trade, and its activities in that regard are fully recorded for 1700, in respect of Hudson's Bay, in 1709 of the disputed colonies, and in 1714 and 1719, when Martin Bladen was one of the envoys to Paris and the claim of the 49th parallel was adduced for the southern boundary of Hudson's Bay. But far more harassing was the confusion caused by the very inaccurate delimitation of the colonial boundaries. Any attempt to dispose of these matters by local Act required the sanction of the Crown, while attention to such efforts was drawn by complaints of private individuals affected by transfer of their lands. The King again was interested in the boundaries of the royal and the proprietorial provinces, in respect of the quit-rents derived from the lands.

The normal method of settling boundary issues was by commissioners appointed by the Board on the authority of an Order in Council, from representative men of the colonies concerned, who were usually paid by the colonies for their services. If the commissioners satisfied the colonies, then the matter was approved by Order in Council; if either party dissented, then the Board would hear all the arguments, and if any irregularity appeared, another commission would be set to work, the whole desire being to secure a just result acceptable as fair to the parties. Thus were settled the disputes between the Carolinas, North Carolina and Virginia, Massachusetts and New York, New Hampshire and Rhode Island. A departure from normal usage marked the New Jersey–New York question, for in 1748 New Jersey by Act defined her boundary and sought to have it confirmed, as it had a suspending clause. The Board declined to admit that any colony should thus decide in its own favour, and repudiated the argument of New Jersey based on an incomplete survey carried out by a commission appointed in 1719 by Hunter of New York under authority of an Act of 1717, on the score that such a commission should have been issued by the Crown, and that the Act of 1717 had been confirmed without adverting to the incidental provision for the commission contained in it. New York then in 1754 left the decision by Act to the Crown, but this was disallowed on the ground that a commission ought to issue first and the parties be allowed to object if they then desired; in 1764 New York consented to adopt the ordinary procedure and in 1767 the commission issued.[1] In the case of the New York–Massachusetts boundary in 1756–7 the Board pronounced after full investigation its view of the true boundary line according to the grants; the agents of the colonies were given two months to consider it, and agreed to accept it, when it was enacted by Order in Council. The actual delimitation, however, remained to be carried out, and though New York in 1764 provided funds for it, the colonies did not agree as to how to survey the line, so that Congress in 1787 had to determine the conflict. The Board also adopted the favourite method of commissions to deal with the dispute between Connecticut and the Mohegan Indians in 1704, and, on colonial objections to its findings, a further commission was ordered, and revived in 1737; on its failure a third was required in 1740 whose decision in 1743 was finally upheld against Indian objections in 1773.[2] The delay was hardly altogether the fault of the Board, but it illustrates the slowness of the procedure and the opportunities it gave to delay by interested parties. Where no actual boundary issue was in dispute, but merely the treatment of settlers in areas which were included in Georgia, after grants had been made by Carolina, the Board was able by the veto power to secure better terms for the settlers from Georgia.[3]

6. *Imperial Defence*

As the central authority, the Board was concerned with the endeavours made by the British government to induce common action by the colonies for defence. Its first report in September 1696 stressed the obvious fact that the forces of the colonies were perfectly capable of dominating the situation, if there were concerted action, as against the refusal of the colonies to aid New York which was left to defend itself with the four companies supplied by the Imperial government[4] and local levies. As an immediate support supplies, presents for the Indians, and recruits for the companies were dispatched; but the Board naturally clung to the view that concerted action was essential, and in 1700 raised the matter in a definite form by planning the scheme of the defence of New York as a barrier against French aggression in the interest of all the colonies. Imperial grants were to be supplemented by levies in New York and £5,000 from the other colonies. But the request was met with the argument of exhaustion from war efforts, and similar suggestions of garrison forces in view of the proposed fortification of Albany and Schenectady led to wholly negative results. The return of peace resulted, of course, in indifference to suggestions of co-operation. The Board, however, remained constantly interested in the problem of security, and in 1717 activity was revived by knowledge of French designs to establish contact between Canada and Louisiana and thus cut off the colonies from western expansion. This danger motived in part the determination in 1720 to take South Carolina into royal control, as is recited in the Order in Council of 17 August 1720, and it led to the proposal next year to secure the settlement of western Virginia by grants of land with remission of quit-rents for ten years and the establishment of forts to control the passes with two companies of Imperial troops as a garrison; but neither project found sympathy with Carteret or the economical Treasury.

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[1] A.P.C. iv. 214, 301, 686; v. 45.

[2] A.P.C. v. 218–20.

[3] Ibid. 113.

[4] The cost was about £7,000 (A.P.C. ii. 316), which was voted from 1716–1762 by Parliament.

In 1721[1] also the Board reverted to its old desire for unity of military command in peace. After the death of Bellomont in 1701 the nominal command-in-chief of the Connecticut militia had continued to be given to the Governor of New York, but neither Cornbury nor Hunter could achieve any real authority over the stubborn insistence of the colony on its local rights, in the absence of any sufficient motive to make concessions. Dudley of Massachusetts and Shute were in like case as regards Rhode Island. Now, after reciting the advantages of getting rid of the chartered governments, and making all colonies depend directly on the Crown as a means of securing respect by European and Indian neighbours alike, of increasing trade, improving returns from quit-rents, and preserving the woods, the Board submitted a proposal to create a Lord Lieutenant or

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[1] N.Y. Col. Docs. v. 627 ff. Lord Stair is said to have been offered the office of Captain-General; Chalmers, *Intr.* ii. 43.

Captain-General for all the continental colonies from Nova Scotia to South Carolina, from whom all other Governors of particular provinces should receive orders, ceasing to have authority in case of his residence in any colony as in the case of the Leeward Islands. The Captain-General was to be accompanied by two or more Councillors delegated from each colony, to be paid independently of the colonies, and to be a person of distinction and experience. By this means a general contribution of men and money might be raised upon the several colonies in proportion to their respective abilities. The plan, as usual, is hopelessly vague, for it leaves unspecified how the Councillors were to be selected and what powers they were to have to bind their colonies. Probably the Board had not thought out these matters and merely cherished the idle belief that by influence the Captain-General would be able to fix provincial quotas which the colonies would honour. It may, however, be admitted that the scheme had the merit of suggesting local initiative, which could not have been less fruitful than the effort, as in 1694 or 1700, to lay down quotas in England, and it would have strengthened the possibility of action to have had constant discussion between members of the executives of the several governments. The plan, however, then came to nothing, and was not revived until 1753–4. It apparently was definitely intended to give the Captain-General control of civil government also, while, when resident in any colony, he would have assumed the full government. The idea lingered on, and it may have prompted Martin Bladen's suggestion of a stamp tax, and doubtless it was the motive for a suggestion sent from England to Clarke of New York. This scheme suggested such a tax in order to provide for the cost of the establishment of a Governor-General and the common defence, and Colden at once wrote to denounce it.

If nothing spectacular could be done, at least the Board encouraged Burnet to secure the building of a fort at Oswego to meet the French advance, in 1722, and it maintained a close watch on developments, urging in 1732 the need of vigilance to meet the French counter-advance. It favoured settlement in western Virginia, urging in 1752 the province to encourage the advent of foreign Protestants by exemptions for fifteen years from parochial rates and taxes, and in 1754 it was prepared to forgo quit-rents for ten years to further settlement in small grants in order to increase the population. It gave benevolent support to the scheme for a grant in 1749 of 500,000 acres to the Ohio Company, a project which precipitated hostilities with France. On the other hand, it laid down in 1736 the rule that grants in South Carolina—where in general it approved settlement—should not be made beyond the Altamaha, lest the Indians there, who served as a friendly buffer between British and Spanish, should be driven into alliance with the latter, and in 1758–9 Pitt insisted effectively on the removal of those who had settled beyond the border-line by the government of Georgia, though a fortified post was maintained as sign of sovereignty.

In the next foreign war of 1739–48 the direction of policy rested not with the Board, which Newcastle consulted chiefly on the technical issues of the colonial claims for services rendered in the Canadian expedition. For the attack on the West Indies the Governors were asked to raise volunteers, the British government to pay them and provide arms, ammunition, clothing, and tents. Men came in readily, and even in Pennsylvania the Assembly admitted the right to enlist servants, though it compensated the owners. But the expedition failed, and Gooch of Virginia, who went as Quartermaster-General, found himself ignored, and his officers resented their being passed over in favour of junior officers of the regular forces, and paid in depreciated currency. Georgia and South Carolina combined forces with a British naval force in 1740 for an attack on St. Augustine, but Oglethorpe mismanaged the business, and accomplished nothing, making amends in 1742 by repulsing a Spanish counter-attack at Frederica, where again British naval forces very imperfectly co-operated. A very different result was achieved by Shirley's enterprise at Louisbourg. He succeeded in 1745 in winning over the General Court of Massachusetts to his scheme for an attack on that fortress, which menaced Massachusetts security and trade, and enlisted the active aid of New Hampshire and Connecticut, though Rhode Island was too tardy to share in the siege, and of the other colonies New York only sent some valuable guns. The force raised was entirely colonial, the three Governors granting commissions; but it had the co-operation under Imperial orders of Warren with his squadron, and the two commanders worked together, Pepperell of Massachusetts being given control of the land forces. The capture of the city resulted in Shirley and Pepperell being authorized to act as colonels of British regiments to be raised in America, and plans were laid down by the Imperial government for raising at colonial expense two forces in 1746, one of 5,000 men from New England, one of 2,900 from the colonies down to Virginia, to operate with Imperial troops against Quebec and Montreal; but this project miscarried, as the Imperial forces were not available, and the peace of Aix-la-Chapelle surrendered Louisbourg. The system of Imperial invitations had not worked badly, and the failure of the proposals of 1746–7 was not due to colonial reluctance.

In the French and Indian war the activities of the Board were prominent, as Halifax was now in control. It was it that suggested that Braddock should report on permanent fortifications and on the necessary Imperial garrisons, and it urged the Governors to advise as to the forts needed on the frontiers and what forces were needed. Pitt, while directing operations as a whole and matters of policy, referred to it regarding the issue of subsidies and their distribution. It consulted with the colonial agents and military officers and suggested quotas when this was not arranged in America by local consultations. It prepared estimates for operations, and supplied ordnance and military stores, while it issued the order for an embargo on export of provisions save to British colonies in 1756, though this order in 1757 was modified by Holdernesse to permit export to Great Britain. It also readily sacrificed its favourite policies of securing a civil list and restoring the financial control of the Governors; it instructed the Governors to permit the issue of bills of credit and to desist pressing changes on their Assemblies, and it held boundary disputes in abeyance. Essentially the whole attitude of the Imperial government was that of seeking friendly co-operation, not attempting to override, or dictate to, the colonies. The doctrine that it lies with colonial governments to decide in what way and to what extent they will take part in Imperial wars, even in defence of their interests, was carried to an extent which was shortly to be deemed excessive by the unwise successors of the great war minister.

In time of peace the Board served a useful purpose in securing on terms of repayment or gratis issues of military requirements for the colonies. In 1712 on the score of heavy demands from

Virginia, Massachusetts, and the Leeward Islands it proposed the grant to it of a fixed annual sum for this purpose, but this was negatived, and special grants had to be obtained, as when in 1730 guns and muskets were suggested for South Carolina. Solvent colonies were made to pay; thus in 1702 Nicholson's demands in Virginia were met by ordering use of the balance of quit-rents, and in 1742–3 Massachusetts, when ordering fresh supplies, had to pay a debt outstanding since 1704.[1] North Carolina, however, was granted supplies and ordnance free for her forts on the Cape Fear River, and engineers were readily lent to the colonies to carry out fortifications, both on the frontiers and at the harbours. On the advice of one of these experts, Colonel Romer, a grant of £500 was obtained for a fort in the Onondaga country, while, later, sums were sent for the defences of Albany and Schenectady, contrary to the general rule that such burdens ought to be shouldered locally. The doctrine that the colonies should help themselves was not rigidly enforced.

The numbers of forces detached for colonial service were not large, and were in the main devoted to the non-continental colonies. Thus in 1737 there were one regiment in Newfoundland and Nova Scotia, one in Jamaica, one company in each of the Bahamas and Bermuda, four companies in New York, and one in Georgia, at a total cost of £52,754.[2] The war resulted in increases in Georgia, so that in 1743 the cost in the continental colonies had increased from £10,213 to £25,025 a year, and the total cost in America to £73,833. The close of the war saw the disbandment of the Georgian regiment and the decision, in deference to the wishes of South Carolina, which offered to supply extra pay, to station there the three companies of which the force was now to consist, but detachments were placed in Georgia. The total cost for America remained at about £80,000, of which some £13,000 was paid for the companies in New York and the south. This expenditure was, in theory, unsound, as the defence of the colonies against Indians was a burden upon them, but the principle was abandoned because the colonies did not care to pay enough for self-defence, and it would have been hard to let the most exposed colonies suffer for a common

[1] A.P.C. iv. 724–6.

[2] Beer, *Brit. Col. Pol.* 1754–65, pp. 263 ff. Cf. for 1679 A.P.C. ii. 847.

neglect. To this expenditure must be added sums of an average of £20,000 a year prior to 1739 for settling Georgia and the enormous sum of £543,625 from 1750 to 1757 for the fortification and settlement of Nova Scotia. Far more expensive naturally, as part of the European defence system, were Gibraltar and Minorca, which cost in 1737 £162,956, and in 1752 £151,104. But these figures ignore ordnance expenditure which came to about £20,000 a year, and, of course, the whole burden of the Imperial navy rested entirely with the home government, nor was it diminished by any serious effort of the colonies to provide for local defence by sea. Against oversea attack and attack by European enemies the Imperial government held itself responsible for securing the safety of the colonies, subject to their obligation to render it aid in the most effective manner possible, considering their independent Assemblies.

7. *Indian Policy*

There must also be reckoned on the side of the Imperial government the substantial sums which were devoted to keeping the Indians on good terms with the British settlers. While the Indian tribes were never treated as independent peoples, but as subject to a British protectorate, every effort was devoted by the Board as representing the central and disinterested government to secure from relations with them the maximum security and the gradual advance of British settlement under conditions which would secure co-operation rather than war. This policy was dictated, if not by enlightened statesmanship, at least by recognition of the danger of throwing the Indians into the arms of the French or the Spanish, who had one great advantage in their dealings with the Indians, the fact that they were not intent on settlements which would destroy the Indian hunting-grounds. At the same time the Board desired on commercial grounds to make sure of the fur trade and to prevent its loss to the enterprise of the French.

The value of the Iroquois as a barrier against French advance was rewarded by a rather lavish grant of presents on such ceremonial occasions as the arrival of a new Governor, or the accession of the sovereign, or, of course, the outbreak of war, and the colonies were wont to add their own to the Imperial gifts. To the southern Indians presents were annually made on a distinctly generous scale, for the sake of the new settlers in Georgia; the sum from 1731 to 1748 appears to have reached £7,000 a year, while thereafter it was fixed at £3,000, included in the Imperial estimates. Some rather ineffective efforts were made through the Society for the Propagation of the Gospel to encourage missionary enterprise, but with little success, partly as a result of linguistic difficulties; while occasional forts were erected both in the north-west and the southern area, and to a slight extent efforts were made to supply the Indians with blacksmiths and artificers as agents of civilizing influences.

In its control of colonial action the Imperial government was mainly guided by the desire not to permit any colony disregarding the interests of the others, or hampering freedom of trade. All British subjects, it was advised by the Solicitor-General on 21 June 1717,[1] were free under English law and the Acts of Parliament to avail themselves of a share in the plantation trade with his Majesty's Indian allies. Colonial legislation must, therefore, be directed to enforcing order and preventing frauds, which drove the Indians from relations with the British; must not injure the trade of neighbouring colonies; must not hamper the distribution and consumption of British manufactures, thus enhancing their cost and diverting trade to the French or Spanish; and must not create monopolies. A Virginia Act was disallowed in 1767[2] on the score of virtually creating a monopoly, and the power given to commissioners was one cause of the disallowance of ten Acts of New York in December 1729.[3] A South Carolina Act was disallowed in 1738 because it endeavoured to monopolize the trade with the Indians, but Georgia was forbidden to hamper Carolina trade. But the mere power of disallowance was quite inadequate to secure any uniformity of treatment, and the jealousy and discontent among the Indians was not surprisingly ascribed in 1762 to the divergence of policy,[4] and, it may be added, to the very different measure in which the provinces enforced laws against the cheating and overreaching of the Indians in trade and land deals. Mere negative rights of repeal were clearly quite inadequate as a basis for a definite positive policy. Within the boundaries of each province the legislature had full authority, subject to possible disallowance, to regulate all Indian affairs, and it was utterly impossible to secure any uniformity of action by mere advice.

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[1] Cf. West, 25 Oct. 1722; Ryder and Strange, 28 July 1737 (Chalmers, ii. 298 f., 300–4).

[2] A.P.C. v. 36.

[3] Ibid. iii. 209. Cf. a Massachusetts Act of 1762 (A.P.C. iv. 559 f.); two Nova Scotia Acts of 1760 (A.P.C. iv. 493).

[4] For efforts to enforce the treaty of 1726 by instructions against land grants in Indian reserves see A.P.C. iv. 283 f. (New York, 1755); general rules Dec. 1761 (A.P.C. iv. 495–8, 500); A.P.C. iv. 543 f. (1762); 730–2 (1765).

8. *Colonization*

On the larger issues of settlement the Imperial government remained the final authority. The Board was regularly consulted by the Council through the Committee or direct, but with reference of the report to the Committee, though in 1768 automatic reference was ruled unnecessary. The Board was largely responsible for deciding schemes of settlement for the newly acquired colonies, whether in America or the West Indies. Its policy in the Floridas is characteristic; land grants were conditional on settlement with foreign white Protestants at the rate of one per hundred acres within ten years, with forfeiture of such parts as were not thus settled; quit-rents of ½*d.* per acre were to be paid, on half the area in five years and on the whole in ten; there were to be reserved lands reported by the Surveyor suited for naval yards, public wharfs, military fortifications or other such purposes, and gold, silver, copper, lead, and coal mines, while hemp cultivation was to be insisted on where lands were suitable. Nova Scotia was settled on like conditions, with one settler to 200 acres and quit-rents of ¼*d.* an acre after ten years, and the right of free fishery on the coast was reserved for all British subjects; while in Quebec 2*s.* per 100 acres, and one settler for that area, were enjoined. The West Indian islands raised the issue of the treatment of French landholders in St. Vincent and Dominica, whom it was desired to retain by granting them lands on lease at moderate charges.[1]

Far-reaching rules were determined upon in 1773, when further grants of land in the American colonies under royal control or the issue of licences to purchase from the Indians were forbidden, save in respect of those soldiers entitled under the proclamation of 1763, and on 3 February 1774 new principles were enunciated giving power to deal with lands to the Governor with the advice and assistance of the Lieutenant-Governor, the local Surveyor-General and Receiver of Quit-Rents, the Secretary and the Surveyor-General for the northern or southern District of America.[1] Lands must be surveyed in blocks of between 100 and 1,000 acres, and then offered for public auction by the Governor with the advice of the Council and these officers; due advertisement must be made, the price must be at least 6*d.* an acre, with ½*d.* an acre quit-rent, reservation of gold, silver, and precious stones and land necessary for public uses. The regulations were among the matters denounced in the Declaration of Independence, but their subsequent adoption by Congress proves their fundamental soundness.[2]

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[1] A.P.C. v. 588–601; iv. 580–609.

The Board, in fact, though hostile to land speculation such as was rife in Virginia, contemplated deliberate colonization.[3] Thomas Walpole's project for settlement at the back of Virginia was considered by the Board in August 1769, and in May 1770 a petition from Franklin among others contemplated a colony on the Ohio. Before the Committee of Council in June 1772 debate was allowed by the petitioners, who urged that the area desired was not within the limits of Virginia, that the treaty of Pennsylvania of 1744 at Lancaster and that of the King at Fort Stanwix in 1768 had placed the area, formerly belonging to the Six Nations, at the disposal of the King, and the Cherokee claim had been put forward only since Mr. Stuart became superintendent. Evidence was adduced of the existence of at least 5,000 families living without settled government, and offers to pay £10,460 7*s.* 3*d.*, the cost to the Crown of the lands, and a quit-rent of 2*s.* per 100 cultivable acres after 20 years, were made; while it was demonstrated as against the Board that the area was not out of reach of commercial intercourse with Great Britain. An Order in Council of 14 August therefore approved the scheme, which the Treasury advocated as financially advantageous. The Indians were duly informed of the decision in April 1773 and welcomed it. On 6 May 1773 the Board presented its proposals for a constitution for a colony to include the area to be granted and other lands not suitable for inclusion in any of the colonies; the constitution was to be of the royal type, with due establishment of the Church of England, but annual sessions of the legislature, and the grantees were to give £10,000 security for payment of the salaries of the royal officers, Governor, clerk and officers of the Superior Court, Attorney-General, Secretary and Receiver-General. Thurlow and Wedderburn criticized adversely the boundaries of Vandalia, and a project of promise fell to the ground in 1774 in part because of the new policy embodied in the Quebec Act, 1774.[1] It is instructive to compare the ideas of 1772 with those of a report of the Board of 7 March 1768,[2] which opposed western settlement on the score that new colonies would be too distant to import British manufactures and would rather themselves manufacture rival wares; that settlement would disturb Indians and injure the fur trade; and that, far from new colonies being a protection to the old, they would themselves stand in need of aid. It would have been a pity had this stood as the last word of British statesmanship.

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[1] Offices created in 1768; A.P.C. iv. 619–23.

[2] Ibid. v. 360 f.; Morison, *Sources*, pp. 97–100.

[3] For the Ohio scheme see A.P.C. v. 55–8, 729 f.

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[1] A.P.C. v. 202–10; vi. 541–3, 555–7. Hillsborough and the Board were overruled, and he resigned; Basye, *The Board of Trade*, pp. 184–7.

[2] Cf. Alvord, *The Mississippi Valley*, i. 276–358.

PART III

THE DECLINE OF THE IMPERIAL CONSTITUTION

XIII. THE FAILURE OF THE IMPERIAL SYSTEM (1754–1764)

1. *Abortive Plans of Union for Defence*

WAR, as often, destroyed the natural development of colonial autonomy and created difficulties which the political skill of the period was inadequate to solve. The peace of Aix-la-Chapelle left all the issues between France and England undecided; the boundary of Nova Scotia remained in dispute; Canada and Louisiana seemed to demand union by a movement fatal to the expansion of the English colonies, while St. Vincent, St. Lucia, and Tobago remained unjustly in French hands. To meet the French menace on 28 August 1753 authority was given to the Governors to repel any aggression, while strictly refraining from attack, and funds were provided for Virginia. On 18 September New York, New Jersey, Massachusetts, New Hampshire, Pennsylvania, Maryland were urged to hold a joint meeting with the Iroquois to secure their friendship, alienated by ill treatment and fear of French aggression. The Congress which met at Albany in June 1754, however, was prepared by the effort of Shirley, Franklin, and others to take a wider view, and to seek a union for defence and co-operation in peace.[1] Virginia and New Jersey could not be represented, but Connecticut and Rhode Island joined in the deliberations. The Commissioners for once saw clearly and in unison; they recognized that the existing procedure was fatal to effective action; six colonies out of seven had refused any aid to Virginia in its need, and mutual jealousy would hamper any efficient steps to make proper use of the great numerical superiority over the French. There emerged a federal constitution for consideration by the colonies. A General Council was to be created, consisting of 48 members, elected by the colonial assemblies; the representation, within limits of 7 and 2, was in due course to be determined by contribution to the common cost. The legislature would have full authority in Indian affairs, political and commercial; it could raise forces, build forts, and maintain vessels for defence on the coast, lakes, and rivers. It could regulate trade with the Indians, purchase Indian lands, not included in any colony, or after the colonies had been reduced to more suitable size, grant lands in these areas, and regulate them pending the erection of fresh colonies. A power of direct taxation for this purpose was given. The Crown would be represented by a President-General, paid by Great Britain, who would act with the Council, and make treaties or declare war or peace. Laws made might be disallowed by the Crown. Annual meetings and triennial elections were provided for. The plan deserved more respect than it received, and Franklin might well regret that it was never tried, for, had the colonies really shouldered the burden of their defence, the experiment of taxing America need never have been tried. The colonies, however, were unanimous in not accepting the scheme; no doubt the essential reason was their ingrained jealousy of one another, coupled with the belief that the Imperial government would defend them if it had to do so. That the scheme was feared as increasing the power of the Crown is most implausible.

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[1] N.Y. Col. Docs. vi. 889 ff.; Beer, *Brit. Col. Pol.* 1754–1765, ch. ii; Macdonald, *Charters*, pp. 253 ff.

As the scheme was not to be put before the Imperial government until it had been approved by the colonies, when Imperial legislation would be necessary to give it validity, the Board of Trade never passed formal judgement on it. What struck that body was the clear fact that the Albany meeting called to conciliate the Indians had failed to win their confidence, had failed to adopt an immediate plan for defence, and had made no plans to strengthen the frontier. In any case it is not likely that any government would have homologated the exact form of union proposed, for the plan meant that important executive functions were to be exercised by a body of 48 with a quorum of 25, including one at least from each of a majority of colonies. The Board's own views were drawn up on 9 August in obedience to a request of the Secretary of State. Commissioners from the Assemblies were to meet, to draw up a scheme for the peace establishments of the colonies, and to apportion the cost according to population, trade, wealth, and revenue. The Commissioners were to be reconvened in any military emergency to decide on further exertions. The Crown was to appoint a Commander-in-Chief over all colonial and Imperial forces, who was to act also as commissary-general for Indian affairs, and to be entitled to ask each colony for the agreed quota. When a convention on this basis was agreed on, it should be sent to England for approval, and to render agreement possible, seven colonies could make a quorum and the majority decision would bind the others. It is fair to say that, in presenting this quite impossible scheme, the Board made it clear that it did not desire to diminish the military aid given, or the moneys paid out in presents to the Indians. More useful was the practical advice to appoint a Commander-in-Chief, the ill-fated Braddock, who was sent with two regiments, while two more were to be raised in America in 1755.[1] The Board's plan was never submitted to the colonies, but it is noteworthy that, like the Albany plan, it contemplated action by Parliament which would be necessary if any colony sought to hamper action by refusing to take part in the proposed convention or failed to pay its due share. Franklin, curiously enough, held that, while action by Parliament over the heads of the colonies would not be popular, it would not excite violent opposition; but Connecticut and Rhode Island hastened to protest against any interference with their autonomy, even though the Albany plan insisted on leaving the colonies all their powers and forbade any imposition of compulsory service on them without their consent.

2. *War Difficulties*

The defects of the lack of unity or system were revealed as painfully as in earlier days by the events of the war.[2] The aid of the colonies had to be purchased by Imperial grants; in 1756 for the help given as to Crown Point and Niagara the Imperial government paid £115,000 as compared with an expenditure of £131,800. Virginia and Carolina had done very little to aid Braddock, but, to prevent ill feeling, in 1757 £50,000 was granted. Pitt furnished subsidies, asking the colonies to pay for clothing, levying, and paying their levies in the first instance, but promising grants which were lavishly accorded, £200,000 in each of 1759–61, and £133,333 in the next years, accounting for at least two-fifths of their outlay. No doubt it was a considerable saving to avoid the difficulties of raising troops in England and the heavy cost of ocean passages; but the war was one essentially affecting America and Loudon's experiences were deplorable. Massachusetts, Connecticut, and New York alone gave willing aid, while Maryland deprived the local forces of the possibility of serving under the King's control. That colony in 1758 and 1759 cloaked its determination to avoid fighting by offering levies conditional on the Council sacrificing the proprietor's interest, while in 1761 a similar accusation was justly levied at Pennsylvania.[1] The Carolinas did nothing, and Virginia in 1760 excused her lack of utility by the suggestion that 1,000 men were needed for Carolina, where they were careful to avoid arriving in time to fight the Cherokees. The conquest of Louisiana planned for 1762 had to be dropped, because the necessary forces could not be supplied, the conquest of Canada having deprived the colonies of any fears. The combined evidence of Loudon, Wolfe, Forbes, and Amherst shows that of the troops supplied an excessive number were of the poorest quality; impartial evidence deplores the condition of the two regiments raised in 1755 at British cost.[2] The colonial view, on the other hand, held that the reverses of 1755–7 were due to disregard of colonial experience of frontier war, and a controversy over the ranking of commissions embittered relations, until Pitt's solution of 1757, which gave colonial commissions rank immediately after royal commissions of the same grade, field officers ranking after colonels when on joint duties. To concert action when no one could tell when the colonial levies would arrive, and to bargain as to times and conditions of service, was depressing and time-wasting, while in lieu of encouraging cordial relations the colonial officers disliked the British and ill feeling was engendered. At the same time, united by common dislike for the British forces, the colonials formed associations which explain the readiness with which the Assemblies were shortly to co-operate against the Imperial government. Nor can it be ignored that the conquest of Canada freed the colonies from the menace of France, though it is impossible to estimate how strongly that fact was realized. It seemed obvious to Peter Kalm, a Swedish traveller, as to Vergennes and Montcalm, that it was not to England's interest to conquer France in America, though Shirley, Governor of Massachusetts, both in 1745 and 1755 contended in the opposite sense, holding that the inherent rivalries of the provinces prevented union in revolt, a view shared by Dummer in 1721 and by Pownall.

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[1] Braddock's council with the Governors of Massachusetts, New York, Pennsylvania, Maryland, and Virginia at Alexandria, 12 Apr. 1755, marks the most complete effect at co-operation. He acted on authority given by the annual Mutiny Act and the Governors under their commissions.

[2] Beer, *Brit. Col. Pol.* 1754–1765, ch. iv; Osgood, iv. 373–414.

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[1] An Act 29 Geo. II, c. 35, was passed to render effective recruiting of indentured servants, penalize harbouring deserters, &c., a difficulty already mentioned in 1740; see Root, *Pennsylvania*, pp. 283, 293 ff.

[2] 29 Geo. II, cc. 3, 5. Foreign Protestants might be commissioned.

Singularly little gratitude for the conquest of Canada was ever shown by the colonial pamphleteers; Dickinson was the most absurd, for he pictured the war as intended to gain England the territory at the back of the colonies and the Indian trade, together with Nova Scotia and the fisheries; the acquisition of these lands was a direct injury to the colonies by cheapening the value of land and encouraging the dissipation of population, thus delaying their development.

3. *Trade Issues in the War*

A further factor which caused a sense of estrangement between the colonies and the mother country was the attitude of the former to the issue of trading with the enemy. It had been the habit of the continental colonies to export their provisions to the French West Indies and secure rum, sugar, molasses, coffee, &c. The advent of war greatly increased the temptation to trade both with the Canadian territories on the mainland and the islands, for it enhanced the value of commodities. The colonies were early warned of the succour thus given to their enemy, and New York, Massachusetts, Pennsylvania, Maryland, and other colonies penalized trade with France even as early in 1755 when formal war did not exist, and when, therefore, trading was not illegal by common law, nor, as W. Murray[1] advised, under the neutrality treaty of 1686, which empowered France to forbid such trade but did not affect trading otherwise. When war was declared orders to enforce prohibition were given to the colonies, and, to facilitate this step, embargoes as in Ireland were imposed by executive order on the carriage of provisions to any save British colonies. In 1757[2] it became necessary by Act of Parlia-

[1] Beer, op. cit., p. 76; see Yorke and Talbot, 1728 (Chalmers, ii. 342).

[2] 30 Geo. II, c. 9.

ment to forbid the export of provisions other than fish, roots, and rice to any destination save Great Britain, Ireland, or a British colony. This, however, was far from ending the matter. France welcomed colonial trading ships and furnished them with licences which saved them from capture by her privateers or men-of-war. A still safer way of procedure was to sail under a flag of truce for the alleged purpose of exchange of prisoners, furnished with a pass from a Governor of a colony. Denny in Pennsylvania shamelessly trafficked in such passes, and Rhode Island was a very bad offender, as S. Hopkins had to admit. Barbados in 1757 made it treason to aid France, but her provisions fed the French colonies through St. Vincent. Bernard insisted that Rhode Island would not desist from malpractices until it was reduced to subjection to the British Empire, 'of which at present it is no more a part than the Bahama Islands were when they were inhabited by the buccaneers'.

Indirect trade was also popular at first, the Dutch island of St. Eustatius and in a minor degree Curaçoa serving as a useful cover. But the policy of the British government, known as the Rule of the War of 1756,[1] pronounced all Dutch trading with the French islands to be illegal, as that trade was normally reserved to French ships and could not be opened merely in war-time, and frequent captures of Dutch vessels ended the active trade by 1759. Monte Christi, in Santo Domingo, was Spanish but had no resources or trade and merely served as a gathering-place for the exchange of French and British produce, 400 or 500 ships in one year taking in French rum and molasses there.[2] The trade was checked in 1761 by naval activity despite judicial doubts; but it not merely enabled the French to obtain invaluable supplies of provisions and to maintain their resistance, but they reaped high prices for their produce, while their sugar, exported as British, undersold the West Indian in the British market and hit hard the British colonies. De Lancey and Colden of New York admitted and deplored the disgraceful trade, but Philadelphia merchants were no better. The British suffered also from the high prices of provisions, especially in New York, as a result of the rushing of supplies to the French market. New England reaped profits from illegal trade with

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[1] Wheaton, *Int. Law* (ed. Keith), ii. 1090–2.

[2] A.P.C. iv. 443–7.

Florida and Louisiana, South Carolina and Rhode Island from that with the French west of Florida via the Spanish. Pitt on 23 August 1760 justly denounced this dangerous and ignominious trade which prevented the British fleet from reducing the French colonies, though it had destroyed French sea power. In 1762 all the bad practices revived when war broke out with Spain, and Amherst was compelled to impose an embargo because the illegal trade was pushing up prices against the British forces to a monstrous extent.

To deal with these iniquitous proceedings much use was made of the royal navy, which thus began its connexion with enforcing the trade laws which was to last through the colonial period. But also important was the enforcement for the first time on a serious scale of the Molasses Act 1733, as suggested by Bull of South Carolina. In Connecticut and Rhode Island, however, the enforcement of these provisions was nominal, a fact which had the untoward result of causing jealousy in Massachusetts and a determination to defy the enforcement of the Act. The attack on the use of writs of assistance[1] was evoked by the use of these writs granted by the Superior Court as a means of dealing with evasions of the Act; despite Otis's eloquence and his argument that an Act against the constitution of the Empire was void, the Court held in *Paxton's* case that the issue was perfectly legal. Another side of the same hostility to law was seen in the attacks made on the Admiralty Court. An effort was made in *Erwing* v. *Cradock*[2] to establish the doctrine that, despite a successful suit in the Admiralty Court, the defendant there might bring an action against the plaintiff in a common law Court and recover damages for the seizure if a jury would give them. Fortunately, though nominally victorious, Erwing, when an appeal was to be taken to the Privy Council, dropped his claim, and the monstrous effort to destroy the jurisdiction failed. The provincial government itself, however, by suits endeavoured to force the Admiralty Court to charge costs on the shares in condemnations of the Governor and informer which, if successful, would have deprived the latter of any real interest in proceeding against wrong-doers, but this effort failed. Other Admiralty Courts simply favoured enemy trade. Gambier in the Bahamas, when made judge of the Admiralty, used the position to release prizes. The New York Court insisted that the Act of 1757 as to forfeiture of ships exporting provisions only allowed trial in the High Court of Admiralty, while it was only a Vice-Admiralty Court, a patent absurdity. The Pennsylvania judge in Admiralty proved useless, ruling that the trade was not illegal by Act of Parliament, and the South Carolina Court merely refused to convict on good evidence. It is not wonderful that considerable bitterness was excited among naval officers, who were endeavouring either to capture the French islands or to put down trade with the enemy, or that they formed the impression that the American colonies were indifferent to the interests of the Empire as soon as Canada fell and relieved them from danger. It is an interesting speculation whether in the interests of Great Britain it would not have been wiser at the close of the war to have left Canada in French hands, thus ensuring American loyalty, while insisting on the surrender of Guadeloupe and Martinique, whose possession proved of immense value to France in the war of American Independence.

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[1] Adams, *Works*, ii. 215; Quincy, *Mass. Rep.* 469.

[2] Beer, *Brit. Col. Pol.* 1754–1765, pp. 120–2.

4. *Indian Policy*

The failure of the Albany Conference to devise any plans for improved relations with the Indians left the British government with no alternative but to take such action as it could by the prerogative. Hence, when Braddock was sent out, Johnson was commissioned by him to act as agent of the British government in negotiations, and in 1756 both he and Edmund Atkin received royal commissions and thus came directly under the Crown, serving as agents for the northern and southern Indians respectively. But this meant no alteration in the system of commercial regulation, which remained in colonial hands. In 1756 Dinwiddie wrote from Virginia to insist that there must be a licence system for traders to secure that the Indians were not supplied freely with rum and cheated out of the price of their furs. Shirley also suggested a system based on Massachusetts rules, but Bernard's account of the existing state of things in 1761 is depressing: the Indians were allowed to run into debt and then to sell their children to pay the creditor; they were encouraged to litigate and ruined by heavy bills of costs; accused of crimes, they were fined to the ruin of their families. Egremont at the same time denounced the advantage taken of the Indians as one of the causes of their preference for the French. Next year the Board of Trade approved the suggestion of Boone, Governor of South Carolina, that he should seek to induce the other colonies to adopt a common plan of action; but they added the sensible observation that the only real remedy was the creation of a general plan of regulation to be carried out by the Crown and its officers under the authority of an Act of Parliament. In pursuance of this general idea the famous Proclamation of 7 October 1763[1] prohibited the Governors of Quebec and the Floridas from granting lands beyond their territorial limits, which were carefully adjusted so as to separate Indians and whites, and other Governors from granting land west of the sources of the rivers flowing into the Atlantic or lands which were reserved for Indians, not having been ceded to or purchased by the Crown. The lands to the west of the rivers, and not included in the new provinces, were to be reserved for the time being and settlers were to remove thence. Land was only to be purchased in the name of the Crown, or of the proprietary government, and not by any private person, and the purchase was to be made at a public meeting of the Indians by the Governor. Trade with the Indians was to be free, but traders must take out a licence from the Governor of a colony and give security to comply with such regulations as might be laid down by the Crown or its commissaries. Fugitive criminals in the reserved areas were to be sent back to the colony concerned for trial.

The issue of this proclamation had been hastened by the desire to do something to render less dangerous the rebellion of Pontiac in May 1763, which proved the deep-seated resentment of the Indians and tried sorely the resources of the country. On 18 October Halifax, as Secretary of State, authorized Amherst to ask the colonies to send aid, pointing out, however, that as this was essentially a colonial interest repayment of expenses was not to be promised. Amherst's appeals to New York, New Jersey, Pennsylvania, and Virginia excited a real response in the last colony only, the excuse being that New England should be asked to aid. When Gage, who succeeded Amherst at the close of the year, invited New England's assistance, he met with quibbles and refusals. Ultimately New York and New Jersey gave half what was asked, and Connecticut raised a few men, but the apathy of Pennsylvania was seen in the usual quarrel between the Assembly and the proprietors, which served its intended purpose of preventing action. Once more the utter inefficiency of the system of requisition had been demonstrated, and that too in a vital issue to the colonies. Moreover the burden was British, for Gage like Amherst had to keep two regiments in America which he had orders to dispatch home.

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[1] Macdonald, *Charters*, pp. 267–72.

It is not surprising that experience of the evil results of the lack of system in Indian relations should have determined the Board of Trade to proceed with proposals for the effective control of Indian affairs. A report of 10 July 1764[1] proposed the establishment of an increased service under two Superintendents; trade was to be confined to a number of posts, and subjected to regulations as to fair prices both of furs and of goods supplied; traders were to be licensed and required to obey the regulations laid down by the Superintendents; all contrary legislation of the colonies was to be annulled. Land was to be acquired from the Indians only by the Crown, not by colonial governments. The cost was estimated at £20,000 a year, and this among other things prevented formal acceptance of the plan. The colonies could not be expected to contribute towards the expense, nor would the Imperial government place it on the British taxpayer, while Colden's suggestion of a tax in kind on furs proved impracticable to work out fairly. Moreover, the eternal question arose whether an Imperial Act should be passed to cancel colonial regulations, or whether the colonies should be asked to repeal them, which it was certain they would not do. What could be done without drastic action was done. Johnson and in the south Stuart mediated between warring tribes, licensed traders, issued regulations, and completed an almost continuous line of demarcation considerably to the west of that of 1763 between whites and Indians, ending with the treaty of Fort Stanwix in 1768, settling a line between central New York and Pennsylvania. But the fundamental fact was fully recognized by the British government that considerations of finance were all-important, and the Indian problem had part of the responsibility for the emergent determination to secure payments from America for defence. The Indian danger had been revealed in its true magnitude. It was inevitable that settlement must advance, which meant that a period of great delicacy in relations with Indians was inevitable, and, as the colonies would not unite in any policy or provide forces for frontier defence on any effective basis, the task must be undertaken by Great Britain.

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[1] N.Y. Col. Docs. vii. 634. Cf. Carleton's instructions, 1775; *Shortt and Doughty*, pp. 614–19.

5. *Defence and Taxation*

There had been earlier suggestions of taxation of the American colonies.[1] In special connexion with the issue of defence against Indian raids, Archibald Cummings of the Boston custom house had urged on the Board of Trade a scheme involving stamp duties on West Indian produce, excise on rum, and a tax on unimproved lands. Sir William Keith, once Deputy Governor of Pennsylvania, also sponsored a stamp tax, a view shared by Martin Bladen. But Walpole was determined not to take action needlessly, and that he passed the Molasses Act 1733 was due to the power of the West Indian influence. It evoked from Richard Partridge on behalf of the continental colonies a strong protest on the score that the Act was 'divesting them of their rights and privileges as the King's natural born subjects and Englishmen in levying subsidies upon them against their consent, when they are annexed to no county in Great Britain, have no representatives in Parliament, nor are any part of the legislature of this Kingdom'. In the same spirit Clinton in 1744 denounced as impolitic the rumour of a stamp tax which had reached him. But Clinton himself, when in trouble with his government over the civil list, came forward in 1750 with a proposal of import duties to fortify the frontiers. In 1751 Colden in connexion with an Indian policy and the need for forts suggested an import duty on liquor and an excise, which must be imposed by Parliament. The war produced from Dinwiddie, who found Virginia difficult to handle and the other colonies useless, repeated suggestions in 1754–6 of a poll tax to provide forts. Braddock and Belcher, Governor of New Jersey, gave similar advice as to the necessity of an Act of Parliament to impose taxation, and Shirley in 1755–6 developed a scheme for forts and garrisons; but, while Parliament should in his view apportion the sums according to white male population, the Assemblies should be allowed to decide how each quota should be actually raised. Franklin, however, was dead against any idea of such taxation, despite his readiness that Parliament should legislate to carry out the system of federal union he advocated at Albany. In 1757 Sharpe, disgusted at Maryland's attitude, suggested that a tax of £20,000 a year might be imposed by Parliament as the colony's quota of expense, and Loudon held an Act essential. Calvert on 10 March 1764 admitted that taxation by Parliament was inevitable, in view of the appalling remissness of the colonies in the war with France, and their disgraceful conduct in the war with the Indians.

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[1] Beer, *Brit. Col. Pol.* 1754–1765, pp. 40 ff.

The financial situation in England was one of difficulty. The war doubled the debt to £130,000,000 with an annual charge of £4,000,000. The army had not alone to be considered, for the naval charge was a million and a half. The cost of the army in America and the West Indies had been not over £100,000 a year before the war; it was now proposed that it should stand at about £320,000, fifteen regiments being stationed on the continent and the rest, five regiments, in the islands. The increase was largely on account of America, whereas only £13,000 a year was normally spent there before the war. Moreover, the war had left the Imperial Exchequer with the onus of providing for the government of Nova Scotia, the Floridas, and Georgia, while Indian affairs were a constant burden, increasing the total expenditure to something approaching £360,000. How far in this policy of a standing army and a Parliamentary fund the government was influenced by ideas of a control of movements in America hostile to British sovereignty is impossible to say. Shirley, however, in 1755 had insisted that secession (which might be encouraged if his scheme of conquering Canada were carried out) would be very difficult if the King maintained a strong naval force, and had 7,000 men in the provinces and the Indians at his command, while the Governor and civil officers were made independent of the Assemblies; and a memorandum of 1762 specified, as one of five reasons for keeping an army in America, the retention of the inhabitants in a state of constitutional dependence. In all likelihood, therefore, this aspect of the force was not unappreciated either in England or in America, and the fact must be allowed weight in judging the attacks which were to be made on the army in America and the reluctance shown to provide funds for its maintenance.

It must be noted that the original intimation of the intention of the British government to maintain an army of 10,000 men in America, and to raise revenue from the colonies, was allowed to pass with no protest. Maudit, the agent of Massachusetts, wrote on 12 March 1763 to inform his government, but remained on 11 February 1764 without instructions, and without any intimation of the intention of the other colonial agents to oppose the step. It is clear that originally it was contemplated in the spirit of Shirley's suggestion in 1755 to apply the funds raised for civil government as well, that being included in Egremont's reference to the Board of Trade on 5 May. But Grenville's deliberate decision was to restrict the amounts raised to the single purpose of military defence, thus leaving alone the thorny issue of rendering the Governors and the chief civil officers independent of the control of the Assemblies. This decision deliberately avoided raising an important constitutional issue, and left the only question to be discussed as that of the justice of taxing the colonies to provide for a defence which they would not of their own volition supply.

Grenville's choice of method fell in the first place on improvements in the enforcement of the laws of trade.[1] The use of naval vessels for this purpose had been sporadic, though it had always been the view of colonial Governors that it was the most effective expedient. In the war they had been naturally freely employed in connexion with the struggle against contraband, and an Act of 1763 definitely assigned to the navy a part in dealing with illegal trade, whether in Great Britain and Ireland or the colonies, and there was extended to the latter the power of dealing with vessels hovering off the coast, which had long been enjoyed in Great Britain. Grenville also investigated the carrying out of the levying of the duties under the Acts of 1673 and 1733, which yielded on an average from £1,800 to £2,000 a year, while the expenditure on customs establishments was £7,000. Much irregularity had been allowed in respect of compositions for breaches of the law, and these were now forbidden. Secondly, the customs officers, who had been staying at home and exercising their offices by miserably remunerated, and therefore venal, subordinates, were ordered to return to their posts. On 9 July 1763 imperative instructions were sent to the Governors with special reference to the clandestine importation of foreign goods into the colonies. The whole issue formed the subject of a report by the Treasury on 4 October, a fact significant of the attention which finance had assumed. The Molasses Act had in the past been intended to prevent foreign colonies enjoying American trade; it was now contemplated using the Act as a producer of revenue.

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[1] Cf. A.P.C. iv. 569–72.

Thanks to the new interest of the Treasury, returns of trade were asked for and obtained from the colonies, which revealed interesting particulars of violation of the laws. Barbados and Jamaica were free from serious fault, but the newly won islands, Grenada, St. Vincent, and Dominica, traded freely with the French islands. Dobbs and Bull gave North and South Carolina clean bills of health in this regard, while Virginia and Maryland were said to be guilty of little more than shipping a little tobacco, evading the dues under the Act of 1673, which had been assigned by the Crown for the benefit of William and Mary College. New Hampshire was asserted to be free from connivance at illegal actions, and Bernard was insistent on the virtue of Massachusetts, with the most significant exception of not merely Portuguese wines and fruit, as in Virginia, but also of foreign sugar and molasses. He was insistent that this item should be left untouched, in flat contradiction with Grenville's policy. In the petty republic of Rhode Island the customs officers were anathema, and they wisely for their own comfort allowed the islanders to import out of 14,000 hogsheads of molasses some 11,500 from foreign colonies without raising any substantial sum in duty. Connecticut, according to Fitch, was careful to keep within the law; but apparently some smuggling took place of Dutch tea into Massachusetts through Connecticut, and New York also derived smuggled goods thence, while some were received from New Jersey. But the navy succeeded in stopping much of that trade in 1764. New York, according to Colden, was not free from misconduct; Hamburg and Holland sent some tea and gunpowder not through England, and the judges were so closely related to the great importers that their impartiality was dubious. Pennsylvania sent rather ambiguous reports, asserting that matters were in order. The net result, therefore, was satisfactory enough save as regards the Molasses Act. It is plain that it was being extensively evaded, and that Governors failed in some cases fully to report that fact, perhaps because they deemed that it had never been seriously intended to be put in force. Evasions of the Staple Act 1663 were clearly not unknown, but not serious in extent. It must be remembered that the system of drawbacks reduced the temptation to smuggle by giving smuggled goods a very slight preference in point of cost.

The reports no doubt convinced Grenville that it was impossible to effect any great increase of revenue without tapping fresh sources of taxation, but that one essential must be the enforcement in a quite new manner of the Molasses Act in some form or other. The controversy which arose was chiefly as to the sum to be charged in lieu of the original 6*d*. a gallon, which could not commercially be insisted upon. That any grave constitutional question was involved clearly did not enter the head of Grenville or his advisers.

XIV. THE CHALLENGE TO IMPERIAL SUPREMACY

1. *The Revenue Act of 1764*

THE Act of 1764[1] expressly provides for the raising of a revenue in the American colonies for the expenses of defending, protecting, and securing the same, and in pursuance of that end imposes fresh duties on foreign sugar, indigo, coffee, wines, silk and calicoes of Chinese, Persian, or East Indian origin, and cambric and French lawns. A strong incentive to import only through Great Britain was given even in the case of those articles which were not to be imported only thence—sugar, indigo, coffee, and wines; while wine carried direct from Madeira, or elsewhere, legally paid £7 a tun, the rate on imports from Great Britain was only 10*s*.,[2] and foreign coffee was dealt with only when not imported from Great Britain. In the same spirit duties were imposed on the export of coffee and pimento from the colonies to other destinations than Great Britain. The Molasses Act of 1733 was made perpetual, subject to the prohibition of the importation of foreign colonial rum or spirits, and the reduction of the duty on molasses to 3*d*. a gallon. The proceeds of the duties were to be placed to a special account in the British Exchequer, to be applied by Parliament for the purpose of American defence. Strong measures were also provided to improve the control of customs; in order to check the practice of illegal importation of molasses, every ship carrying non-enumerated goods from a colony had to furnish a bond, as in the case of enumerated goods, guaranteeing that if any molasses were put on board subsequently it would be carried to Great Britain or a colony and duly reported on arrival, while, if a vessel were found by a customs officer within two leagues of any colony without a certificate of a bond having been duly given, or if the certificate were not produced to the collector on arrival, the penalty was forfeiture. To prevent frauds warrants from the collectors were required for all intercolonial trade. Another fraud was checked by insisting that all foreign manufactures to be sent via Great Britain to the colonies must be laden and shipped there; as usual salt for the fisheries in New England, Newfoundland, Pennsylvania, New York, and Nova Scotia, wine from Madeira and the Azores, and horses, victuals, and linen cloth from Ireland might go direct. A penalty of treble the value of the goods was imposed in respect of illicit importation or exportation of uncustomed or prohibited goods. To the list of enumerated goods were added coffee, pimento, coco-nuts, whale fins, raw silk, hides and skins, pot and pearl ashes, while iron and lumber were to be taken to Great Britain alone.[1] Some further revenue was to be derived, but by Great Britain itself, from the repeal of the drawback allowed on the exportation of European goods to the colonies. This was expected to yield about £20,000 yearly, while the new duties yielded £25,000, not a seventh of the cost of the army now to be kept in America. Most important clauses were inserted to safeguard customs officers in their difficult function of prosecutions; if they failed, but it was held that the seizure had been made with probable cause, no damages or costs could be obtained by the owner; the owner, further, must prove his case, and must give security for costs. Further, in 1765 the colonies were forbidden to reduce the fees of the officers. Much as these changes were resented by the colonies, their objections were still more strong to the rule now enacted that, at the option of the informer or prosecutor, penalties arising from any violation of the Acts of trade could be recovered in any colonial Court of Record or Admiralty Court, or in any Court of Vice-Admiralty which might be appointed for all America. In pursuance of this new provision the Earl of Northumberland was created Vice-Admiral of all America and W. Spry made judge of the new Vice-Admiralty Court with concurrent jurisdiction in all cases, but no right to hear appeals.[2] As Martin Howard pointed out, the creation was justified by flagrant ignoring of the laws of trade, but the placing of the Court at Halifax was clearly a hardship and an error, only remedied in 1768.

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[1] 4 Geo. III, c. 15. Bounties on hemp (c. 26) were given, and duties on beaver skins (c. 9) and whale fins removed (c. 30) for colonial benefit.

[2] Such wines were to pay only £3 10*s*. a tun in Great Britain.

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[1] Under 5 Geo. III, c. 45, lumber could go to Ireland or south of Finisterre, and iron to Ireland.

[2] A.P.C. iv. 663–5.

2. *The Stamp Act of 1765*

Grenville quite frankly warned the colonies that he must supplement the revenue and would bring forward a Stamp Act, but he gave time for the colonial agents to find out from the colonies what they would prefer instead. The colonies gave no suggestions other than the idea of falling back on the outworn requisition system, and the petitions both of the colonies and of the London merchants against the legislation were rejected as usual in the case of revenue bills. The Act[1] passed in the Commons by 205 to 49 votes, and imposed stamp duties on legal and commercial documents, newspapers, almanacs, pamphlets, cards, and dice; it was thought a specially convenient mode of legislation as it would be self-supporting, for documents not duly stamped would be legally invalid, while it is fair to say that care was taken in detail not to ignore special needs in the colonies as compared with England. The produce was estimated at from £60,000 to £100,000, of which the West Indies would bear half. By a very remarkable provision penalties under the Act might be sued for in the Admiralty Courts, or the Vice-Admiralty Court under the Act of 1764, while a general right of appeal was given in all cases from the Admiralty Courts to the Vice-Admiralty Court in order to secure the more effective operation of the former. The measure, to the ministry's astonishment, aroused violent resistance; it could not be executed in America through the universal character of the opposition. Massachusetts urged on 8 June 1765 united action by the Assemblies, and in October at New York a representative Congress met and pronounced judgement on the Act.

The position adopted by the resolutions of the Stamp Act Congress,[2] 19 October 1765, was of a very restricted character. It adopted the view that the King's subjects in the colonies owed the same allegiance to the Crown as was owing from the subjects born within the realm and 'all due subordination to that august body, the Parliament of Great Britain'. But his Majesty's liege subjects in the colonies were entitled to all the inherent rights and liberties of his Majesty's subjects within the kingdom, and it was inseparably essential to the freedom of a people and the undoubted right of Englishmen that no taxes be imposed upon them but with their own consent, given personally or by their representatives. The colonists, however, from their situation could not be represented in the House of Commons. Their only representatives were persons chosen by themselves in the colonies, and no taxes ever had been or could constitutionally be imposed on them but by their respective legislatures. All supplies to the Crown were free gifts to the people, and it was inconsistent with the principles and spirit of the British constitution for the people of Great Britain to grant to his Majesty the property of the colonists. It was further contended that the trial by jury was the inherent and invaluable right of every British subject. On the strength of these principles the Stamp Act by imposing taxes, and that Act and several other Acts by extending Admiralty jurisdiction, had a manifest tendency to subvert the rights and liberties of the colonists. To these arguments of constitutional right were added practical considerations. The circumstances of the colonies rendered the stamp duties specially burdensome, and from the scarcity of specie the payment was absolutely impracticable. Moreover, as the profits of the colonies centred in Great Britain to pay for manufactures which they were obliged to take thence, they eventually did contribute very largely to all supplies granted there to the Crown. The restrictions imposed by the recent legislation on colonial trade would render them unable to purchase British manufactures. The increase, prosperity, and happiness of the colonies depended on the full and free enjoyment of their rights and liberties, and an intercourse with Great Britain mutually affectionate and advantageous. Finally, it was the right of the British subjects in the colonies to petition the King or either House of Parliament, and it was the indispensable duty of the colonies to the best of sovereigns, to the mother country, and themselves, to endeavour by an address to the King and humble applications to both Houses of Parliament to procure the repeal of the Stamp Act, and the Acts extending Admiralty jurisdiction and restricting commerce.

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[1] 5 Geo. III, c. 12.

[2] Macdonald, *Charters*, pp. 313–16.

The economic arguments were not without weight. It was true that it was no part of the scheme of the British government to withdraw funds from North America; the scheme contemplated that the taxes would be disbursed in respect of the cost of the Imperial forces stationed there. On the other hand, the

Imperial government had done nothing to facilitate the establishment of a satisfactory system of coinage, and the imposition of the taxes would have caused real inconvenience in this regard. But something could be said for the broad proposition that the profits of the colonial trade might be deemed to be a practical contribution indirectly towards the problem of defence expenditure, and much certainly could be adduced for the view that the issue was not worth any breach in cordial relations with the United Kingdom. The legal arguments, however, were of a very difficult and embarrassing type. In the case of Great Britain opinion had steadily been hardening into a full acceptance of the absolute sovereignty of Parliament which is enunciated in effect by Blackstone,[1] and the idea that there was some overruling constitutional doctrine which limited the sovereign power of Parliament was far from welcome. It is not as if the idea of a fundamental law were unknown in England,[2] for Cromwell had recognized the advantages of such a law, though he had failed to establish it. But English thought had not moved along the lines of this idea, while at the same time colonial thought had rather tended towards this conception, as is clearly proved by the fact that the founding of the constitution of the United States on a true federal basis with a supreme overriding law was not long afterwards to be practicable. The idea had been taught by New England divines, and it must be remembered that the New England tradition had not held that English law was the basis of the law of these colonies. Rather had these colonies deemed that the immutable law of God should be their standard, though practical life had forced them one and all to acceptance of the necessity of human legislation; and royal authority had laid down, if it had not enforced, the standard of accordance with the principles of English law. It will, however, be noted that, in laying down such a standard, the English government was fostering the growth of the idea of a supreme law, a fact which explains much that is else strange in the arguments, for example, used against the régime of Andros in New England. When the New Englanders declared that a sheriff could not be chosen if he were not a freeholder, or that the trial of the Ipswich insurrectionists outside their vicinity was illegal, they appealed to English legal principles as having a sanctity superior to any local law and as overriding it. It was not a difficult step for men to accept it as natural to apply the same principle to English laws themselves, and hold them inferior to the eternal laws of nature. The argument, it must be noted, was absolutely legal in character; no appeal was made to mere natural rights at this stage of the proceedings, but to doctrines which were rights of such a character that they were essential parts of the British constitution, and as such enjoyed inalienably by British colonists in America, whose rights, the Resolutions insist, are absolutely the same as those of British subjects in the United Kingdom itself.

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[1] *Comm.* i. 160 f.

[2] McIlwain, *High Court of Parliament*, ch. ii.

This point of view is far most effectively set out in James Otis's pamphlet on *The Rights of the British Colonies*,[1] issued at Boston in 1764. Government is not founded on grace, force, compact, property, but has an everlasting foundation in the unchangeable will of God, the author of nature whose laws never vary. The British colonies were subject to and dependent on Great Britain; and as over subordinate governments the British Parliament had an undoubted power to make Acts for the general good that by naming them shall and ought to be equally binding as upon the subjects of Great Britain within the realm. This principle had been admitted to his personal knowledge for twenty years in Massachusetts, and it had ever been so since the beginning in that and the sister provinces through the continent. The power of Parliament was uncontrollable save by itself; it was not for provinces to adjudge Acts unjust and refuse obedience, which indeed was treason. But Parliament in its wisdom would repeal an Act which it found to have been passed in error, contrary to the constitution and not for the common good. Reasons could be given why an Act ought to be repealed and yet should be obeyed until it was so repealed. But 'if the reasons that can be given against an Act are such as plainly demonstrate that it is against natural equity, the executive Courts will adjudge such an Act void. It may be questioned by some, though I make no doubt of it, whether they are not obliged by their oaths to adjudge such an Act void.' Parliament is not absolute; nay, its business is to declare law, *ius dicere*, not to make it, *ius dare*, which appertains to God alone. It is the part of Parliament to declare what is for the good of the whole, but it is subject to the immutable laws of God; if it offends against them, it will itself on having the error pointed out repeal its Acts; in evident cases the judges will declare the Act of a Parliament void. The constitution contains this splendid principle of mutual checks, the supreme executive is corrected by Parliament, and Parliament is controlled by the supreme executive in the King's Courts of law, where he appears as represented by his judges in the highest lustre and majesty as supreme executor of the Commonwealth. The attempt in England to distinguish internal and external taxes Otis entirely rejected: if there was an equitable right to tax trade, it was equally equitable to tax land, and it would be extremely inequitable to tax trade alone, when taxation of land and trade together had not availed to supply means in the late war when all was at stake. The conquest of Canada had brought benefit to Great Britain, but only security against the French and the Indians to America, whose trade had not benefited by a groat. The other great English argument from the fact that the colonies were corporations which should be taxed for the general government, as well as provide for their special needs, was met by the proof of the essential difference between the two cases. The corporations were represented in Parliament as the colonies were not. The corporations did not raise money to support men and officers nominated by the King; they did not provide forts and garrisons; they did not support the King's civil government; the relations between a supreme and a subordinate state of dominion were not to be measured by the principles applicable to a corporation of button-makers. Otis's conclusions, however, led him to a view which the Stamp Act Resolutions firmly repudiate. He deemed that the colonies should not merely preserve their local governments, but that they should be represented in some proportion to their numbers and estates in the British Parliament. This was an idea which, if carried out, would have undermined the exemption of the colonies from taxation, and, as a result, it was never received with any acceptance by colonial thought, though at one time Franklin himself was anxious to see it accomplished. In England Pitt, George Grenville himself, as well as an experienced official like William Knox and an economist like Adam Smith, favoured the idea; but English opinion was on the whole absolutely opposed to such a step. Burke treated the plan as rendered impracticable by distance, though the technical objections based on this consideration were exaggerated by him out of reasonable measure, while Soame Jenyns was so little impressed by the idea that he negatived it on the score that, after recent experience of American eloquence, it would be cheaper to pay for the army there than for its orators.

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[1] Morison, *Sources*, pp. 4–9.

Otis's argument raised one point which is not stressed in the official contentions of the colonies and was not given effect to in America, the doctrine that the Courts might end the situation by declaring void the Stamp Act or other Acts—he contemplated in 1764 of course only those of trade—on the score of running counter to natural equity. He had in mind above all the famous declaration of Coke in *Bonham's* case:[1] 'In many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such acts to be void.' Yet it was Coke who said[2] that 'the power' of Parliament is 'so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds', nor is it really possible to accept Professor McIlwain's[3] ingenious suggestion that this declaration is intended to cover Parliament viewed in its judicial capacity as well as its legislative powers. The cases adduced by Coke assuredly do not bear the interpretation imposed on them by Coke. The judges unquestionably in the earlier period of English interpretation of statutes felt themselves free to adopt a more generous interpretation than that which is now possible when judges set themselves to carry out the meaning of an Act if that is at all possible, rather than interpret it in a more reasonable sense, leaving it to Parliament to remedy mistakes which it makes.[4] Nor does it avail to adduce the declaration that an Act of Parliament could not make the King a parson,[5] for that concerned religious things; and here the dominant precedent is the fact that the Chief Justice of King's Bench refused to accept the doctrine of Sir Thomas More that the indictment against him was bad on the ground that no Act could make the King supreme head of the Church.[1] The best case in favour of the dictum was the interpretation of the assize of novel disseisin in such a manner as to prevent a lord being judge in his own case.[2] This doctrine appears again in a dictum in *Day* v. *Savadge*,[3] and was reached by Holt[4] when expressing a very wide view of the powers of the legislature. It has been decisively negatived in modern times, and it is clear that it was never actually applied in a case where the Act could not be interpreted in any other sense. No other cases were available to Otis to support his doctrine, and it is noteworthy that, when he urged the Court of Massachusetts in *Paxton's* case to accept the view that an Act against the constitution was void, and that, therefore, writs of assistance were invalid, the Court did not yield to the argument. Moreover, the supremacy of Parliament had been forcibly asserted in *Streater's* case in 1653,[5] when the Chief Justice declined even to permit counsel to urge that an Act of Parliament could be void as being against the laws of the land. To aid Otis's plea, it would certainly have been necessary to prove that the doctrine had been applied since the beginning of the seventeenth century, and of that no scintilla of proof was available. This no doubt explains the indifference with which the argument was treated both in England and America.[6]

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[1] 8 Rep. 118; cf. p. 248 *ante*.

[2] 4 Inst. 36.

[3] *High Court of Parliament*, pp. 290 ff.

[4] *Canadian Performing Right Society Ltd.* v. *Famous Players Canadian Corporation Ltd.*, [1929] A.C. 456.

[5] Y.B. 21 Hen. VII, p. 4; Brinton Coxe, *Judicial Power*, pp. 147–53.

3. *The Declaratory Act of 1766*

But there remained the solid argument that the constitution of the British Empire coupled representation with taxation, and thus invalidated in law a taxing Act binding those who were not represented, at any rate unless they had been offered and had not availed themselves of the right of representation. The British government was indeed determined to yield on the issue of maintaining the Stamp Act, but it was equally determined not to do so without asserting in the fullest manner the doctrine

[1] Roper, *Life of Sir Thomas More* (ed. Lumby), p. li.

[2] 2 Inst. 25.

[3] Hobart's Rep. 87. Contrast *Lee* v. *Bude and Torrington Ry. Co.*, L.R. 6 C.P. 582 *per* Willes J.

[4] *City of London* v. *Wood*, 12 Mod. Rep. 687.

[5] 5 St. Tr. 372 f.

[6] Adams reiterated it as regards the Stamp Act (*Works*, ii. 155 ff.), and in *Hancock's* case (1768: ii. 215). See A. C. McLaughlin, *The Courts, the Constitution and Parties* (1912), pp. 75–94.

of Imperial supremacy. It had, as it happened, an admirable model to adopt in such legislation, the Statute of 1719[1] declaring the dependency of Ireland, and this was closely followed. The Act of 1766[2] recites the colonial claim of the sole right of taxation and the denial of the legislative authority of Parliament, and declares 'that the said colonies and plantations in America have been, are, and of right ought to be, subordinate unto and dependent on the Imperial Crown and Parliament of Great Britain; and that the King's Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons of Great Britain in Parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America subjects of the Crown of Great Britain in all cases whatsoever.' It was added 'that all resolutions, votes, orders, and proceedings in any of the said colonies or plantations whereby the power and authority of the Parliament of Great Britain to make laws and statutes as aforesaid is denied or drawn into question are, and are hereby declared to be, utterly null and void to all intents and purposes whatsoever'. The Act passed the Lords on 7 March, and though the King had determined to accept the repeal of the Stamp Act, it was not allowed to be repealed without formal protests by thirty-three Lords on the second, and twenty-eight on the third reading, before it passed on 17 March.

In its action Parliament had not merely before it information of the moderate resolutions of the Stamp Congress, of the complete success in resisting the Act attained in the American colonies, of the more violent proceedings in the Virginian House of Burgesses,[3] but also the reasoned opinion of so prudent a man as Franklin.[4] His examination revealed that in his view America had not yet advanced to the length of denying the power of external taxation, though, if the issue were pressed, he saw clearly that the next step would be to deny any right of taxation whatever; Otis's view had not yet, it is clear, won general acceptance even in circles of advanced views. He distinguished customs duties from stamp duties because, on the one hand, they could be avoided by the process of not using imported goods, while, on the other, the duties could be regarded as a premium paid for the security of navigation and regulation of trade by the Imperial Parliament. Pressed by the argument that the Post Office Act of 1710 dealt with internal matters and actually provided free ferry facilities to be provided gratis, he took refuge in the doctrine of payment for useful services and acceptance of a general convenience which rendered ferry owners willing to render the services demanded. He asserted, when reminded that Parliament had actually in 1711 and 1713 been brought to the point of contemplating passing a perpetual revenue Act for New York, that he had no information of any such proposal. Further confronted with the clear allusion in the Charter of Pennsylvania 1681 to the right of Parliament to tax, he asserted that it was assumed that, if Parliament desired to tax, then representatives would be invited from the colony. Much more satisfactorily he repudiated the idea that local taxation was contrary to the Declaration of Right, on the score that the prohibition of raising taxes without Parliamentary assent clearly had reference to English conditions. On the material side of the question, he insisted on the fact that the colonies had played a full share in the burden of the war in blood and treasure, referring to the great payments of England as proof not of English generosity but of recognition of important services; even Maryland's inaction he attempted to explain away. The only mode of raising sums for the common defence which he could recommend was the time-honoured device of a letter from the Imperial government in the King's name asking for contributions, a contention which ignored the fact that such appeals failed in the late war save when reinforced by Pitt's generous subsidies. He felt, however, that the colonial governments would readily indemnify those injured by the irregular proceedings in resisting the Stamp Act, if that were left to their sense of justice.

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[1] 6 Geo. I, c. 5.

[2] 6 Geo. III, c. 12. By c. 11 the Stamp Act was repealed and c. 51 indemnity given for its breach in America.

[3] Morison, *Sources*, pp. 14 ff.

[4] *Parl. Hist.* xvi. 137 ff.

A very clear idea of the distinction still accepted in America between permissible and objectionable forms of taxation is given in Daniel Dulany's *Considerations on the Propriety of imposing Taxes in the British Colonies for the purpose of Raising a Revenue by Act of Parliament*,[1] issued at Annapolis in 1765.

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[1] Morison, *Sources*, pp. 24–32.

He admitted fully the subordination of the colonies to Great Britain, and recognized that the welfare and even the very existence of the mother country as an independent kingdom might rest on her trade and navigation. Hence there existed a real right of regulation of these matters, nor did he deny that to regulate trade was often best carried out by import and export duties, so that revenue might thus be raised incidentally. But this was a wholly different thing from imposing an internal tax on the colonies without their consent for the single purpose of revenue, or, as he also puts it more broadly, from imposing any tax for the single purpose of revenue. The distinction, therefore, is not baldly between external and internal taxes, but rather on the purpose; in its formulation it must be remembered that prior to 1764 taxes on commerce had been for the most part intended as means of prohibiting or greatly reducing trade; if the plantation duties of 1673 yielded some slight revenue, it was not their purpose, but rather the compelling of sending the enumerated products to England.

Dulany also dealt comprehensively with the doctrine urged in favour of the Stamp Act that the colonies were virtually represented in Parliament, seeing that they were in precisely the same position as the non-electors in England. Against them were cited the fact that the franchise in England was attached to freehold property as against leasehold or personal property, to franchises, and to inhabitants in certain places; thus the merchants of London, the proprietors of the public funds, the inhabitants of Leeds, Halifax, Birmingham, and Manchester, and the great corporation of the East India Company had no representation in Parliament. He answered this objection by insisting that the classes enumerated were not incompetent to become electors, that in fact as individuals many were, and that members of Parliament were among their number, while they were identic in interest with friends and relatives who were electors. Any mistakes in taxation would affect the whole body of electors and non-electors, while, if non-electors could not be taxed, they would be in the absurd position of enjoying all the advantages provided by taxation without paying for them. On the other hand, it might well seem to the people of the United Kingdom just to impose taxes on the colonies which would injure the latter without immediately harming themselves, for, even admitting the solidarity of Imperial and colonial interests, it was impossible to assume that this fact would be sufficiently clearly recognized to prevent improper action.

These views were all fully present to the minds of the statesmen who debated the issues in the House of Lords. Lord Lyttelton[1] argued decisively from the relations of the colonies as dependencies; there must be a supreme government from the nature of civil society as formed on compact; if the colonies were parts of the King's dominions, they were entitled to his protection, and, on the other hand, subject to the sovereign power of Parliament, and must submit both to internal taxation by Parliament and their own legislatures. If the relation were conceived otherwise, then it was fluid and the colonists had no claim for protection. In this argument undoubtedly the answer was implied to the contention, afterwards advanced, that the relation between the colonists and the sovereign was personal; the King *qua* a person had no power whatever to give protection or comfort at the expense of Great Britain to colonists. The case for the colonial view was admirably put by Lord Camden,[2] who urged with remarkable earnestness and conviction the view that 'taxation and representation are inseparably united; God hath joined them, no British Parliament can separate them'. The colonies had, he held, no right to resist, no right to independence, but the law of the British constitution did not permit the British Parliament to tax those who were not represented. Parliament was not absolute; it was subject to the eternal and immutable laws of nature, the law of God. Whatever it could enact, it could not enact anything contrary to divine law, nor could it violate the rule that property might not be taken away without compensation, nor pass an Act of attainder without hearing the accused. He appealed to the sovereign authority of Locke—who was treated by all disputants with a respect explicable only by the fact that he was in essence the official apologist for the revolution of 1688—and insisted on his doctrine that the supreme power could not take from any man any part of his property without his consent. Moreover, he buttressed his theory with an elaborate argument that historically and legally taxation and representation were coeval with and essential members of the constitution. The clergy in 17 Rich. II had insisted on the doctrine that none but they could grant their property to the Crown; when they had dropped the practice (in 1664) it was because they had power to secure representation in Parliament. When territories had been taxed, it was simply because they were admitted to representation. Chester had objected successfully to taxation when unrepresented. Wales had never paid taxes until long after Henry VIII had granted it representation. Calais and Berwick were taxed only when they had members. Jersey, Guernsey, and the Isle of Man sent no members and were not taxed. Hale himself had laid it down that Ireland could not be taxed, because it was not represented (a doctrine mentioned by counsel in *Pilkington's* case).[1] In any case it was inexpedient to impose taxation on reluctant colonists.

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[1] *Parl. Hist.* xvi. 166 f.

[2] Ibid. xvi. 168–70, 178–81; cf. xviii. 164, 208.

Northington[2] insisted that the exemption of the clergy from taxation was merely the result of Boniface's power, not of any legal principle; taxes could be levied legally by Parliament or by the local legislatures; the colonists were British subjects and subject to obligation of a just share in the burdens of the Empire. But the best legal answer was that of Lord Mansfield,[3] whose exposition was full and careful. The two fundamental principles he enunciated were that the British Parliament, 'as to the power of making laws, represents the whole British Empire, and has authority to bind every part and every subject without the least distinction, whether such subjects have a right to vote or not, or whether the law binds places within the realm or without'; and 'the colonists by the condition on which they migrated, settled and now exist, are more emphatically subjects of Great Britain than those within the realm; and the British legislature have in every instance exercised their right of legislation over them without any dispute or question until the 14th January last'. He had no difficulty in showing that it was not the case that Parliament had recognized the right to compensation when property was taken and consent was a relative term. Acts in England such as the Militia Act had been resisted just as the Stamp Act had been resisted in America, but by enforcement they had come to prevail and to be accepted. The concession made to the clergy was a mere yielding by the King to superior force at the time. Representation, so far from being an essential condition of taxation, had been a matter of grace and favour and it was far from complete; the great corporations like the East India Company had no representation. The rule of interpretation of statutes, that they were not to be read as applying to the dominions unless it was expressly so mentioned, was a proof that the supreme legislative power did exist, for otherwise the rule was unintelligible. Moreover, history established the fact that there was nothing to prevent legislation and taxation for territories before they were represented. Chester was granted representation under Henry VIII, precisely because it was bound by all English laws which included taxing laws. It was expressly mentioned in the Act, 25 Chas. II, c. 9, providing for Durham that it was right that it should be represented in Parliament, because it was already subject to taxation. Calais and Berwick had been given members under Henry VIII, but domestic regulations had been passed by Parliament under Henry VI. The argument from Wales was invalid; granted that Wales was not subjected to English taxation before Henry VIII had accorded representation, it must be remembered that, both before and for a considerable time after this event, Wales paid special *mises* of her own to the King, so that, as was made clear in the statutes granting exemption, no question could arise of taxation as that was needless. The proprietor of the Isle of Man had in 1765[1] been before the House in connexion with legislation for his principality which he held in almost sovereign independence, but he had never attempted to deny that Parliament had the legal power to tax. Indeed, it might be argued that under the Declaration of Right the raising of money save by authority of Parliament was absolutely illegal.

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[1] Y.B. 20 Hen. VI, f. 8.

[2] *Parl. Hist.* xvi. 170–1.

[3] Ibid., 172–7.

The colonists, in the second place, were specially dependent on the power of Parliament. Three classes of colonies could be distinguished: (1) Royal governments where under the Governor's commission there existed a legislature with a purely subordinate power of legislation in the nature of by-laws for local government which could not exclude Imperial power. (2) Proprietary governments, which were placed in the case of Maryland on exactly the footing of Durham, and therefore subject to Parliament, or as in the case of Pennsylvania were expressly made subject by the terms of the Charter which not only authorized Parliamentary taxation, but provided for the repeal by the Crown of local Acts. (3) Chartered Colonies, of the type of Virginia (apparently Mansfield had forgotten his history), Connecticut, Rhode Island, and Massachusetts, where the governments were essentially of the corporation type. He reminded his audience that the Massachusetts Charter had been vacated by Chancery in 1684, and contended with force that it was absurd to place such corporations above the power of Parliament. The lands granted by the Charters were to be held as of the Manor of East Greenwich; they were essentially of the nature of corporations and could not claim to be independent sovereign authorities.

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[1] *Parl. Hist.* xvi. 16 ff. For the application of Acts see P. Yorke, 23 Aug. 1727 (Chalmers, i. 203 f.); 5 Geo. III, c. 26.

Mansfield strengthened his theoretic disquisition by a long list of Parliamentary legislation actually passed for the colonists or proposed to be passed. Had not Coke himself declared in 1621 that an Act passed by Parliament would regulate the right of fishery granted in colonial waters to the colonies? Had not the Commonwealth in 1650 declared the doctrine in absolute terms? Was not the Act of Settlement an Act of settlement of all the King's dominions, and did it not bind the colonies? There had been Acts to impose duties, customs dues, and to regulate the post office, and in any case it was absurd to attempt to separate the right to tax and the right to legislate. Nor was authority lacking, for Yorke and Worge had declared in the case of Jamaica in 1724 that Parliament had full power to impose taxation on that island. Camden replied at some length, but it cannot be said that in this or subsequent debates anything more important was evolved. The one argument, which should have been alone adduced by Camden, was obviously not that legally there was no power in Parliament to impose taxation, but that it was wholly contrary to the practice of Parliament and the spirit of its legislation to tax where it could not offer representation. That was really proved by the examples adduced, and the issue was only obscured by the declarations of Camden on the point of law. They served merely to render his judgement as a lawyer suspect. The trend of legal development justified the disagreement of the Lords, for the advocates of the independence of the colonies as regards taxation soon felt logically bound to proceed to the further step of absolutely denying legal power to legislate at all. It is true that Pitt[1] espoused the same cause in the Commons as Camden in the Lords, but he failed to support his distinction by any logical arguments, and his own views as to the power of Parliament were distinctly ominous. 'This kingdom', he argued, 'as the supreme governing and legislative power has always bound the colonies by her regulations and restrictions in trade, in navigation, in manufactures, in every thing except that of taking their money out of their pockets without their consent.' It was difficult to accept such a doctrine, and Burke[2] wisely did not attempt it.

4. *The Townshend Acts*

Unhappily for the Empire illness disabled Chatham, who took office in August 1766, from exerting real power, and the erratic Townshend, irritated by the continuance of unrest in America, and confronted by the demand for reductions of taxation from the landed interest, which ultimately brought about the lowering of the land tax from 4*s.* to 3*s.* in the pound and compelled the raising of fresh revenue, conceived the fatal device of levying taxes on America by a method open to no legal objection. On 26 January 1767 George Grenville moved that the American colonies like Ireland should support an army establishment of their own, and Townshend came forward as an advocate of the doctrine of raising funds in the colonies for their government and protection. The colonies, he urged, were united in repudiating internal taxation, but could not object to external taxation, and from that source funds could be derived through the imposition of import duties, and contemporaneously the taking of measures to render their enforcement more effective. On 29 June 1767 was passed an Act[3] imposing duties on the importation into the American colonies of glass, red and white lead, painters' colours, paper, and tea, the last being rated at 3*d.* a lb. The produce of the rates was not as in the Stamp Act to be confined to the purpose of supporting colonial defence.

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[1] *Parl. Hist.* xvi. 97–100. Pownall in 1769 (xvi. 501–6) more wisely argued from prescription and the terms of the Charters as rendering internal taxes unjust.

[2] *Parl. Hist.* xvi. 605. Cf. 'I consider the power of taxing in Parliament as an instrument of empire, not as a means of supply', 19 Apr. 1774; ibid. xviii. 1266–7.

[3] 7 Geo. III, c. 46.

On the contrary, it was in the first place to be applied to 'making a more certain and adequate provision for the charge of the administration of justice and the support of civil government' in the colonies where expenditure should be found necessary. The sums were to be determined absolutely by the King under sign-manual warrants countersigned by the Treasury,[1] and no reference was necessary to the colonial legislatures. The residue, if any, was to be paid into the royal Exchequer, and applied under Parliamentary authority for the purpose of protecting, defending, and securing the colonies, as had been laid down in the case of the Sugar Act. Provision was also made as to the entry and report of vessels in the colonial trade in order to secure fuller control of imports; the master of any ship, before proceeding to the place of unlading, was obliged to go to the custom house, and make a true and just entry upon oath before the Collector and answer on oath such questions as might be put. Moreover, the grant of writs of assistance was expressly entrusted to the superior or supreme Court of justice in each colony, thus removing the difficulty which had arisen because the Navigation Act of 1696, while conferring the power to demand writs of assistance, had omitted to specify the Court. As the English practice was to use the Exchequer Court and no such Court normally existed in most colonies, the supreme Court might hamper action by refusing jurisdiction. The provisions as to tea in this Act were accompanied by a further Act (c. 56) which gave a drawback of the duty of 1*s*. a lb., imposed on the importation of tea into the United Kingdom, on the re-exportation of tea to the British colonies, expressly with the view of extending the sale there and discouraging illicit importation. By a third Act (c. 41) a most important administrative change was brought about. The difficulties of the control by the Treasury and the Commissioners of Customs of the conduct of business in America were obvious, and much delay was involved in the reference of matters home; while, in the absence of an effective superior local control, it was impossible to secure proper obedience to the orders of the Commissioners. Accordingly the King was empowered by commission to establish a body of Commissioners, three to be a quorum, who should be established in America and who should have the same powers as were vested by law in respect of the American colonies in the Commissioners of Customs in England. The Act was duly followed by the establishment of the Commissioners, and by the improvement of the control of customs under their direction.[1] Of their efficiency in collection of revenue no doubt exists, but this mere fact naturally rendered the burden of the new system much more galling.

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[1] £32,287 was thus spent in 28 June 1768–5 July 1776; the total revenue 1767–75 was £219,452, collected at a cost of £13,000 a year; Channing, iii. 90 f., 154. In 1768 four Vice-Admiralty Courts were set up at Halifax, Boston, Philadelphia, and Charleston with appellate jurisdiction from local Courts and original jurisdiction in all suits for penalties or forfeitures under Imperial Acts of trade or revenue under 8 Geo. III, c. 22; A.P.C. vi. 151–3.

At the same time, 15 June 1767, was passed an Act[2] of equal constitutional importance, but confined to one colony. The ministry's plans for sending troops to America necessitated, of course, special legal provision, and this was duly contained in the annual Mutiny in America Act of 1765.[3] As it was known that the numbers sent would be in excess of the usual figures, a Quartering Act was at that time passed in order to secure due accommodation and provision for the soldiers. In June the Governor of New York intimated to the legislature the probable arrival of forces and asked that steps be taken to carry out the Quartering Act. The request hit New York hard, for obviously, as the centre of military activity in America, it was bound to be put to disproportionate expense, and the Assembly on 19 June begged to be excused from undertaking an indefinite burden of crushing weight, but expressed willingness that £3,999 in the public treasury subject to the order of the Commander-in-Chief of the forces in America might be used for this purpose. Pressed for further definition of the proposal the Assembly enacted that provision should be made to furnish the barracks at New York and Albany with beds, bedding, firewood and candles, and utensils for dressing of victuals for two battalions, not exceeding 500 men, and one company of artillery for a year. The omission from this provision was not very serious—salt, vinegar, small beer or cider or rum rations being passed over—as compared with the requirements of the Quartering Act, but the limitation of numbers was significant. Shelburne asked for reconsideration, but New York was reluctant to assume too heavy a burden of responsibility. The House of Commons took the matter seriously, and the Act, passed on the recommendation of a Committee, provided that until due obedience should be paid to the requirements of the Act of 1765 as continued in operation by subsequent Acts, the Governor might not assent to, nor might the House of Representatives pass, any bill, order, resolution, or vote, though the Speaker might be chosen. The Assembly refused compliance and was dissolved. A second Assembly proved equally obstinate, but in 1769, as the result of a change in local political groupings, the necessary legislation was passed.

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[1] See Instructions, 1769, in Morison, *Sources*, pp. 74–82.

[2] 7 Geo. III, c. 59.

[3] 5 Geo. III, c. 33. Renewed 6 Geo. III, c. 18; 7 Geo. III, c. 55; 8 Geo. III, c. 19; 9 Geo. III, c. 18, &c.

It was inevitable that this legislation should challenge attention and aggravate feeling. It is true that the principle involved was not entirely novel. Despite the repeal of the Stamp Act the Imperial Parliament had, besides making minor alterations in the Act of 1764 intended to meet colonial feeling, lowered the duty on molasses to 1*d.* per lb., but had imposed it on all molasses imported into the colonies, thus destroying the aspect of the original duty as a matter of regulation of trade and converting the impost into a simple matter of taxation.[1] The legislature of Massachusetts in January 1768 gave earnest attention to the Acts, and adopted a petition to the King protesting against them. But after full consideration it took the important step of sending on 11 February a circular-letter[2] to the other Houses of Representatives and Burgesses in America, inviting their views on the issues. The letter was laid before the Cabinet by Hillsborough on 15 April and on 21 April earnest instructions were sent to the Governors, asking them to prevent their Assemblies acting on the invitation of Massachusetts. Bernard was instructed to demand from the Massachusetts house the rescission of the resolution for the dispatch of the missive; on 30 June the house by 92 votes to 17 declined to do so and was promptly, if vainly, dissolved.

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[1] 6 Geo. III, c. 52, which put duties on imported British colonial coffee and pimento, and required non-enumerated goods to be sent south of Finisterre or to Great Britain or Ireland (7 Geo. III, c. 2). The importation of foreign silk stockings, gloves, and mitts was prohibited by 5 Geo. III, c. 48. The duties on Eastern fabrics, French cambric, &c., were to be paid in England (1766). Cotton-wool became free.

[2] Macdonald, *Charters*, pp. 330–4.

The terms of the letter are important: it was conceded 'that His Majesty's high court of Parliament is the supreme legislative power over the whole Empire', but it was claimed 'that in all free states the constitution is fixed, and, as the supreme legislative derives its power and authority from the constitution, it cannot overleap the bounds of it without destroying its own foundation; that the constitution ascertains and limits both sovereignty and allegiance; and, therefore, his Majesty's American subjects who acknowledge themselves bound by the ties of allegiance have an equitable claim to the full enjoyment of the fundamental rules of the British constitution; that it is an essential unalterable right engrafted into the British constitution as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own which he may freely give but cannot be taken from him without his consent; that the American subjects may therefore, without any consideration of Charter rights, with a decent firmness adapted to the character of freemen and subjects assert this natural and constitutional right'. Acts therefore for the sole and express purpose of raising a revenue were an infringement of these rights, because, as they were not represented, the Commons was granting their money without their consent. Representation was impossible in view of the thousand leagues of sea, and it being utterly impracticable to have full and equal representation in Parliament, in view of the cost of partial representation, taxation without consent would be preferable to such representation as could be attained. It was, in addition, inequitable that duties should be paid on manufactures there in addition to those paid in England and the other advantages to Great Britain from the Acts of trade. Exception was also intimated to the grant to the Governor of a salary independent of and at the expense of the people, and to the subverting of the principles of equity and the security of the subject by the practice of appointing salaries to judges and other civil officers when their tenure of office was at pleasure of the Crown. The Quartering Act was denounced as burdensome, and the Commissioners of Customs were represented as having the power to burden the country with officials without benefit to trade.

It is clear that Massachusetts at this stage had not advanced beyond the doctrines of Camden, to whom among others a copy of their views was sent. The position regarding representation was obviously acutely felt; an offer of representation would have cut away the ground from under the House's feet, and it was therefore necessary to forestall it, though in fact, in the temper of England, it was not likely to be made. Even the revolt of the colonies could extract nothing more from the King and the Imperial government than a tentative idea of a strictly limited representation without any attempt at proportional equality.[1] The views of the House were evidently much the same as those of John Dickinson in his *Farmer's Letters*,[2] which, it may be admitted, show little of the ability of Otis, but had considerable effect. To the theory that external taxes were valid, he opposed the doctrine that any tax on the colonies was bad. The greatest vigilance was requisite to prevent impositions for the sake of revenue being passed off as regulations of trade; any encroachment must be resisted, or power might be used, just as the House of Commons was beginning to abuse its powers over money bills by tacking other matter to such measures. Legal authority to regulate trade by impositions was certainly vested in Parliament; it might also forbid manufactures in the colony, as had been done in the case of iron and steel without any objection to such action being raised. But duties for raising a revenue were an innovation in the Act of 1764 since repeated in those of 1765 and 1767, and the innovation was a usurpation. It was true that America might properly be expected to pay any export duties levied on exports from Great Britain, but not any duties imposed on America only. Otherwise America might be deprived of all liberty; if she were forced to go to Great Britain for all manufactures and on them any sum desired might be imposed as duties, Americans would be 'as abject slaves as France and Poland can show in wooden shoes and with uncombed hair'. The danger of allowing the Crown to dispose of the revenues thus raised on the government in America was illustrated by the true and unhappy instance of Ireland, where in two years £158,685 had been added in pensions to favourites, and where he was 'an uncommonly lucky Irishman who can get a good post in his native country' in view of the exercise of patronage in favour of Englishmen. Special stress was also laid on the constitutional aspect of the Act against New York. Dickinson saw, more clearly apparently than his contemporaries, that the Act was an assertion of sovereign power and that the Quartering Act in effect compelled the state to spend money in order to comply with its instructions.

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[1] Royal Instructions, 1778 (Morison, *Sources*, p. 200).

[2] 1767–8, extracts in Morison, pp. 34–54.

The tension in Massachusetts was not lessened by the growing lawlessness of feeling which manifested itself in the episode of the seizure in June of the sloop *Liberty* and in the disturbances arising out of the attempt to exercise the right of impressing American sailors. Not until October 1768 did troops very tardily reach Boston in response to much earlier requests for the presence of a force to impress the inhabitants, who, when the force arrived, had already lost any serious fear of the power of the British government to execute its purpose, and had instituted the practice of meetings at Faneuil Hall for public business.[1] The papers on these matters were laid before the Commons in November, and on 15 December a motion was brought forward in the Lords asking that the Governor be instructed to seize and send home the ringleaders in the recent disturbances, in order that they might be put on trial for treason under the statute 35 Henry VIII, c. 2, passed to provide for the punishment of treasons committed overseas. The House of Commons concurred on 9 February 1769 in a proposal which was open to every objection.[2] Even had it been practicable to arrest those accused, it would have been most unjust to try in England for offences committed in Boston, for, while trial locally meant partial juries, it could hardly be asserted that trial in England meant impartial ones, and it would certainly be easier for the government to produce its witnesses than for the accused, who would in any case be exposed to the heaviest expense. The opportunity to protest was much too good to be lost, and the House of Burgesses of Virginia, which no doubt felt that Massachusetts had been having too much of the leadership in the business of baiting the Imperial government, passed on 16 May[3] a series of strong resolutions, for which it was duly dissolved.

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[1] A.P.C. v. 246 ff.

[2] *Parl. Hist.* xvi. 476–511. But it was not illegal, as Channing (*Hist.* iii. 102) suggests; cf. *Orurke's* case in 2 St. Tr. 649.

[3] Macdonald, *Charters*, pp. 334 f.

But the resolutions were circulated, and other Assemblies expressed full concurrence with them. It was asserted that the sole right of taxation lay with the local legislature; that the right to petition was undeniable, and that it was desirable to secure the concurrence of other colonies in dutiful addresses asking for intervention in favour of the violated rights of America. The strongest protest was made against taking any person for trial in respect of offences of any kind committed within a colony to a place outside the colony as depriving him of the privilege of being tried by a jury from the vicinage and of summoning and producing witnesses at his trial. Fortunately enough, the episode was not followed by overt action. In point of fact, the troops at Boston were in no case to do anything rash; in March 1770 they were forced mainly in self-defence to use their arms against some of the citizens, and opportunity was taken by the leaders of the revolutionary movement to compel their withdrawal from the area of the town itself lest there should be a regular rising.[1] Needless to say, a force in this condition was not formidable, and happily the Boston jury were fair-minded enough to recognize that the deaths caused were not cases of murder. Moreover, the situation was eased by the decision of North's ministry in 1770[2] to withdraw the duties of 1767 as they had not proved to be remunerative, on the one hand, and on the other the American boycott of British products was embarrassing and dangerous. Unhappily for the sake of principle, one duty, that on tea, was maintained to prove that the taxing power was really in the hands of Parliament. But unquestionably relations improved, and it required considerable efforts on the part of Samuel Adams and others in Massachusetts to maintain their revolutionary propaganda.

In June 1772, however, the burning of the *Gaspée*, a vessel engaged in attempts to protect the revenue from the smugglers in Rhode Island, renewed friction.[3] The Imperial government naturally resented this illegal action, deliberately committed in defiance of the royal authority, and sought to secure by investigation the apprehension of the malefactors. Unluckily it was suggested, though negatived by the Law Officers, that they might be made amenable to trial in England under the Act, 12 Geo. III, c. 24, for better securing his Majesty's dockyards, ships, ammunition, and stores. The Virginian House at once seized the initiative, and on 12 March 1773[1] decided to form a Committee[2] of eleven members, including Patrick Henry and Richard Lee, to correspond with the sister colonies regarding Acts and resolutions of the British Parliament or proceedings in administration relative to the American colonies. This device of establishing committees was not new, in so far as in 1768 and in 1772 it had been inaugurated in Massachusetts as a means of maintaining a steady agitation against the administration, but the application of the principle to intercolonial relations was the starting-point for that co-operation which was soon to be brought into a definite shape by the episode of the Boston tea party. In Massachusetts the spirits of the dissidents had been kept up since the preceding September by constant insistence on the dangers of the system of paying the Governor and other officers from funds under Imperial control. The matter was one in which Samuel Adams was not unsuccessful in badgering the excellent Hutchinson.[3]

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[1] Hutchinson's hesitation to remove the troops as beyond his power, an attitude adopted by Bernard in 1769, was followed on 1771 by an alteration in the Instructions to make his power clear; A.P.C. v. 295.

[2] 10 Geo. III, c. 17.

[3] A.P.C. v. 356–8; vi. 519–25.

5. *The Boston Tea Party and Lord North*

The Boston tea party was hardly the most creditable episode in the revolutionary agitation, though the Imperial government was, as ever in this period, extremely clumsy and incompetent in its actions. The renewal in 1773 of the principle asserted in the Tea Act of 1767 that a drawback was allowed of the 1*s.* per lb. import duty on tea, provided it was re-exported to America, secured that country the boon of cheap tea. But tea had long been refused acceptance by loyal Americans, so long as it was taxed on entry into the colonies, as was the case even when the other Townshend duties were repealed in 1770. In 1772 the position established by an Act[4] was that a drawback of three-fifths only of the duty was granted on the expiry of the

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[1] Macdonald, *Charters*, pp. 336 f.

[2] E. D. Collins, *Am. Hist. Ass. Rep.* 1901, i. 245–71; J. M. Leake, *The Virginia Committee System*, pp. 88–92.

[3] For specimens see Morison, *Sources*, pp. 87–96.

[4] Schlesinger, *The Colonial Merchants*, pp. 262 ff.; M. Farrand, *Am. Hist. Rev.* iii. 266.

Act of 1767, and the tea must be sold by the company at a public sale. Under this scheme legally imported tea must be fairly expensive, for the middlemen had to be paid. Under the Act of 1773 (c. 41) not merely was the full drawback conceded but the Company, which was in financial straits, was allowed to export direct from its warehouses. Unhappily the Company mismanaged the business. It was clear that a strong temptation would be offered to the colonies to purchase their tea legally, and not accept, as they had been doing, smuggled tea, for the new rules would enable it to be sold legally at prices with which the smuggled tea could hardly compete. Had the Company secured the services of those firms in the colonies who usually handled tea and were popular, the whole thing might have gone off successfully and the boycott might have been broken. But in fact they accepted the services of merchants who were already unpopular with the public by reason of their not sharing in the boycott, and hence the merchants of Boston and other towns were incensed by the spectacle of the trade profits likely to be derived by their rivals. Moreover, tempers in Boston had been exasperated by the episode of the Whateley letters.[1] Hutchinson and the Lieutenant-Governor, Oliver, had written in 1767–9 to Whateley, a member of the Commons, suggesting that changes in the constitution of the colony were essential; Franklin obtained them and forwarded them to the leaders in Massachusetts, whose Agent he was, for perusal. He had promised that they would not be printed, but of course they were published, and the Council and Assembly demanded the withdrawal of the Governor and Lieutenant-Governor. The petition was referred to the Privy Council, and before it Wedderburn S.G. arraigned Franklin for his certainly discreditable share in the business, with a foolish and unstatesmanlike virulence which rendered Franklin a distinct enemy of the Imperial connexion. It is easy to understand that the enemies of the Imperial government saw the opportunity presented by the arrival of the tea ships in December 1773, but the worst might have been avoided, as it was at New York and Philadelphia, where landing was prevented, had the Governor shown some sense. He insisted, however, on carrying out the letter of the law, refusing permission to depart, and on 16 December the tea-ships were raided and the tea destroyed.[1] Nor was there much sign of repentance on the part of the legislature. It proceeded instead to carry on its quarrel with Oliver by impeaching him as Chief Justice on the score that all judges in receipt of salaries from the Crown were untrustworthy.

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[1] A.P.C. v. 385–7; Franklin, *Writings* (ed. Smyth), vi. 183–92.

None the less the action taken in Parliament on the receipt of the news was unwise. North and his colleagues had evidently no realization of the strength of the opposition forces in America, and they proceeded to adopt measures which should have been passed only if the government possessed the effective means of carrying them safely into effect. The Boston Port Act[2] provided for the closing from 1 June of the port of Boston until full satisfaction should have been made to the East India Company for the destruction of its tea and to the revenue officers who suffered in the rioting in November 1773–January 1774. The Massachusetts Government Act,[3] passed 20 May, altered drastically the constitution of the colony. It recited the fatal effects of the election of the Council, and provided in lieu for the substitution of a nominated Council appointed by the King as usual, not to be less in number than 12 or more than 36. The power to constitute judges of the inferior Courts, the Attorney-General, provosts, marshals, and other officers of justice, and to remove such officers was given to the Governor acting alone; sheriffs were to be appointed likewise, but removed only with the assent of the Council. Judges of the superior Court were to be appointed by the Governor but removed only by the King. Town meetings were not to be called without the leave of the Governor, except in March or May for electing constables, selectmen, and other officers, and at these meetings no other business was to be done save with the Governor's assent; this clause was stated to be intended to counteract the abuse of using these meetings for discussions of public business to the detriment of the government. The election of jurors was annulled, and the power to summon given to the sheriffs, with elaborate provisions to secure the service of adequate numbers, and penalties for refusing to serve. The Administration of Justice Act,[4] passed also on 20 May, made a necessary provision for the protection of officers acting in the suppression of riots or in enforcement of the laws of revenue; if any inquisition or indictment were found for murder or other capital offence, then on proof by oath that the action questioned was committed in such circumstances, the Governor, if he held that an impartial trial was impossible, might order the proceedings to take place in Great Britain or another colony; in that case bail might be granted, and due provision was made in the Act for the effective prosecution of such charges. The Quartering Act,[1] passed 2 June, remedied a defect which had been evidenced when the troops arrived at Boston in 1768. The law was held by the Boston magistrates merely to provide for the use of barracks for the forces, and there were barracks, though so situated as to be of no real value in over-awing the town. The new Act provided that, where barracks were not convenient, the colony must make provision as if there were none, and in default of local action authorized the Governor to take possession of unoccupied houses, barns, &c., making reasonable allowance for them. The last two Acts, it will be seen, were moderate and reasonable. The first two were passed without allowing Massachusetts sufficient time for a full representation, though their Agent asked that this be accorded. There was indeed no doubt that the province had committed a grave error in permitting such lawless conduct, but the moral advantage was lost through the hasty action of the government. With these four Acts in the American mind was joined a fifth, the Quebec Act, which was regarded as a device to bring a French Catholic army to attack the American colonies and to shut them out from expansion to the west.

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[1] A.P.C. vi. 550–5.

[2] 14 Geo. III, c. 19. For these Acts see *Parl. Hist.* xvii. 1163–1408.

[3] 14 Geo. III, c. 45.

[4] 14 Geo. III, c. 39.

6. *The Continental Congress*

It was possible to close the port of Boston, but Gage as Governor[2] was quite unable to manage Massachusetts; his nominated Councillors were mobbed and dare not act; juries would not function and Courts could not proceed. On 17 June an invitation was sent by the House of Representatives to other Assemblies for the meeting at Philadelphia of Committees chosen by the Assemblies, or by conventions, or by the existing Committees of Correspondence, to discuss the situation with a view to the restoration of civil and religious liberty, and of union and harmony with Great Britain as most ardently desired by all good men. The British government neither could nor would hinder the meeting which took place on 5 September, only Canada, Florida, and Georgia being unrepresented. Yet the temper of the First Continental Congress was bitter,[1] for the representatives had been chosen in the main by extremists. But an effort was made by the more moderate elements to secure a basis for an honourable settlement of the issue. The danger of separation was manifest, for a meeting at Suffolk in Massachusetts had determined to pay no obedience to the recent Acts of Parliament, to pay no taxes, and to seize officials if any attempt were made at arrests. Moreover, since 1773 Samuel Adams, who was still the leader in Massachusetts, had been advocating a Congress of States or an Independent State or American Commonwealth. Galloway[2] submitted on 28 September and almost carried a scheme for a proposed union between Great Britain and the colonies. There should be a British and American legislature, as an inferior and distinct branch of the British legislature for all general purposes of the American colonies. It would consist of a President-General appointed by the King, and a Grand Council elected by the people in the colonial legislatures for a period of three years. It would meet once a year or oftener, elect its own speaker, and have the privileges of the House of Commons. The President-General would have a negative voice as regards its Acts, and would be charged with executing its laws. Its functions would cover all matters civil, criminal, and commercial in which Great Britain and any of the colonies, or all the colonies, or more than one colony, were in any way concerned. Matters of this kind could originate either in this Parliament or in that of Great Britain; in either case the assent of the other would be requisite, save that in time of war Bills for granting aids could be passed with the assent of the President-General without the assent of the Imperial Parliament. It may well be doubted if the scheme would have had any supporters in the British government, but it failed ultimately to be accepted and the resolutions of the Congress on 14 October 1774 were far from conciliatory.[1]

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[1] 14 Geo. III, c. 54.

[2] His appointment in this capacity obviated any conflict with the Charter which gave supreme command to the Governor, a point stressed by Pownall.

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[1] Adams, *Works*, iii. 340–404; *Journals of Cont. Congress* (ed. W. C. Ford, 1904).

[2] Morison, *Sources*, pp. 116–18,

The Declaration opens with a provocative recital of the various Acts against the liberties of the American people, and proceeds to assert that 'the inhabitants of the English colonies in North America by the immutable laws of nature, the principles of the English constitution, and the several Charters or compacts have the following rights'. These are given as life, liberty, and property, which cannot be dealt with save by their consent. Further their ancestors were entitled, when they emigrated, to the rights, liberties, and immunities of natural born British subjects, and their descendants have not forfeited these rights. The foundation of liberty is participation in the legislature; the Americans are not, and cannot be, represented in Parliament, and therefore are entitled to a free and exclusive power of legislation in their local legislatures where alone they can be represented, in all matters including taxation, subject only to the negative of the sovereign. 'But from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such Acts of the British Parliament as are *bona fide* restrained to the regulation of our external commerce for the purpose of securing the commercial advantages of the whole Empire to the mother country and the commercial benefit of its respective members, excluding every idea of taxation external or internal, for raising a revenue on the subjects in America without their consent.' The claim is further made of enjoyment of the common law of England including jury trial, of enjoyment of the statute law as existing at their colonization and if found suitable to the circumstances, and to privileges contained in the charters and laws. The right to petition is asserted, and the illegality of prohibitions or commitments for such action is declared. The keeping of a standing army in time of peace is declared to be illegal and also the legislative action of a mere appointed Council. On the basis of these rights the demand is made for the repeal of the whole series of trade Acts from 1764, the Act of 1772 for the protection of dockyards, and the five Acts of 1774, while the illegality of standing armies was reasserted. As a means of enforcing the desires of the colonists, it was agreed to enter into a scheme for the non-importation and non-consumption of British goods and for non-exportation to Great Britain of American goods.

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[1] Ibid., pp. 119–25.

It cannot be said that this Declaration was calculated to bring about a peaceful settlement, and it contained a doctrine, that of the absence of any sovereignty in the Imperial Parliament, which was at once new and alarming to the British public.[1] Chatham's reaction to it is seen in his proposals for a reconciliation on 1 February 1775. He would have claimed for the Imperial Parliament competence to deal with all matters touching the general weal of the whole Dominion of the Imperial Crown and beyond the competency of the distant representatives of a distant colony, and more especially an indubitable and indispensable right to make and order laws for regulating navigation and trade throughout the complicated system of British commerce. He was not ready to admit that Acts on such matters as these could be deemed to have validity in the colonies merely by sufferance and acceptance, the old doctrine of the Massachusetts Company under the first Charter. Nor could he accept as valid the protests against a standing army when employed under the authority of an Imperial Act; these representations he deemed derogatory to the dignity of the Imperial Crown, but he was ready to concede that such a force could never be lawfully employed to violate and destroy the just rights of the people. He naturally reiterated the doctrine that taxation without representation was illegal, but he did not conceal the view that, when the Congress resumed its business in May 1775, as it proposed to do, it ought to come forward with some proposal for a due contribution towards Imperial expenditure. The gulf between him and the American leaders was already marked. In these circumstances it is not surprising that even when North determined on concession and secured the King's assent, his proposals went a very little way towards the end desired. All that was proposed, and accepted by the Commons on 27 February 1775,[2] was that, if any legislature made suitable provision for a contribution towards defence, the amount raised to be disposed of by Parliament, and also engaged to make provision for the support of the civil government, and the administration of justice, it should be proper, so long as the arrangement was carried out, to cease to levy and to refrain from imposing any tax, duty, or assessment, except only such duties as it might be expedient to continue to levy or impose for the regulation of trade, the net produce of such duties to be carried to the credit of the colony concerned. The offer was rejected by Congress on 31 July[1] with somewhat unnecessary heat, but it was felt that the offer was insidious, since, as it was made to any colony, it tended to divide the colonies and diminish their solidarity. It was also justly complained that it involved virtually a surrender of the whole of the position of the colonies; it compelled them to contribute for defence, to the extent deemed right by the Imperial Parliament; it left Parliament and government to spend the funds raised on a standing army at their discretion; it also arrogated to Parliament the right to say what sum was proper to be spent on civil government and justice; it implied no surrender of the supremacy of Parliament or the right to alter Charters, as in the case of Massachusetts. If the colonies were bound by the laws of trade, further payments were unjustified. It is interesting to note Franklin's view[2] of the proposals of Galloway and North. He had become disgusted with the British government and people, dazzled by the spectacle of the glorious public virtue so predominant in the rising America as contrasted with the general corruption in the old rotten state of England. But, if an agreement were possible to avoid a civil war, he held that there must be made a clean sweep of the Declaratory Act, all Acts levying duties on the colonies, all Acts altering the charters, constitutions, or laws of the colonies, and all Acts restraining manufactures. Those parts of the Navigation Acts which were for the good of the whole empire, such as the requirements as to shipping, should, together with duties for regulating commerce, be enacted by both the British and any American Parliament; then the duties should be assigned to each colony, and the officers to carry out the Acts be appointed by the colonial governments who would apportion the salaries. It is noteworthy that Franklin was clear that regulation of commerce would necessitate duties, and that he saw clearly that the sound doctrine was to allow the proceeds to go to the colonies. This principle was adopted in the Act of

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[1] *Parl. Hist.* xviii. 155 ff., 198, 221 ff.

[2] Macdonald, *Charters*, pp. 367 f.; *Parl. Hist.* xviii. 319–23.

[1] *Parl. Hist.* xviii. 385–9.

[2] Franklin, *Works,* v. 435–9.

1778[1] which renounced taxation of the American colonies, for, while the right to impose duties for the regulation of trade was retained, the net proceeds were assigned to the colonies. But the control of the collection was retained in Imperial hands, instead of being delegated, as Franklin would have desired, to the colonies themselves. In favour of this procedure may be set the fact that it would have been very difficult to expect local appointees to carry out such Acts with great fidelity.

Events in the meantime had moved rapidly in America: through the winter Gage had been unable to prevent Massachusetts remaining in open revolt, and Lexington on 19 April 1775 recognized rather a *fait accompli* than occasioned a definite breach. In March and April the Imperial Parliament passed Acts[2] restraining the trade of New England and the southern colonies with Great Britain, Ireland, and the West Indies, and preventing them engaging in the Newfoundland fishery; on 6 July Congress published its declaration of the causes of taking up arms,[3] though on 8 July[4] a more conciliatory address was passed and entrusted to Richard Penn to lay before the King. But before this could be done, as the result of Lexington, Concord, and Bunker's Hill, followed by Washington's appointment to command the forces in rebellion, the King issued his proclamation of rebellion on 23 August,[5] and the petition of 8 July was given no answer. On 22 December 1775, after conciliation proposals had been rejected by large majorities, there was passed an Act to forbid trade with America.[6] Formal separation was not long delayed: on 15 May 1776 Congress recommended to the colonies the adoption of popular constitutions, denying that conscience permitted the taking of oaths for the carrying on of any government under the Crown; on 29 June the Virginia Convention declared that 'the government of this country as formerly exercised under the Crown of Great Britain is formally dissolved'; and on 4 July 1776 the Declaration of the Independence of the United States was issued.

7. *The Denial of Imperial Sovereignty*

The denial of Imperial supremacy which appears in 1774 was doubtless of gradual growth. James Wilson in his *Considerations*

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[1] 18 Geo. III, c. 12.

[2] 15 Geo. III, cc. 10 and 18.

[3] Macdonald, *Charters*, pp. 374–81.

[4] Ibid. 381–5.

[5] Ibid. 389–91.

[6] 16 Geo. III, c. 5.

on the Authority of Parliament, published in August 1774,[1] declares that he formed the view in 1770, but deemed it needless to make it known as matters then were amicably arranged. His own argument is not wholly convincing, for it rests on an imperfect knowledge of the Irish precedents: he cites *Pilkington's* case[2] without, it is clear, knowing that it had never been judicially decided, and must be deemed to be meant merely in the sense, held in *Calvin's* case,[3] of an assertion that Ireland could only be bound by an English Act when named therein. His own view was that the colonists were in direct relations with the King to whom they owed allegiance, and from whom they received protection; here he ignored the fatal objection[4] that the King in his personal capacity had no power to protect, and that the protection given was that of the Crown of England with the support of Parliament. The difficulty of the necessity of the regulation of trade he met by the suggestion that the King should regulate inter-imperial trade by virtue of the prerogative, as he did international trade by the making of treaties. This would have the great advantage of removing any risk of impositions, since there was no prerogative power to impose duties. This suggestion rests, of course, on the totally vain idea that the King, as an individual, could wisely seek to control trade relations; obviously he must have done so on advice, and any attempt to carry out the suggestion would have revealed its utter impracticability. Doubtless colonial writers did not realize the fundamental doctrine long received in England that the King acted through and by the advice of ministers. We find the same inability to recognize facts in the discussions[5] in 1773 between Hutchinson, Governor of Massachusetts, and the Assembly. The case for the Imperial point of view was admirably put on 16 February by the Governor, who controverted carefully the claim of the Assembly that the colonies were an acquisition of foreign territory, not annexed to the realm of England, that they were not part of the Kingdom, and therefore not subject to the legislative authority of the Kingdom; 'for no country by the common law was subject to the laws of the Parliament but the realm of England'. The Assembly's theory rested on an insistence on the view in *Calvin's* case that allegiance was due to the natural person of the King, and it endeavoured thence to draw the conclusion that the relation between the colonies and England was similar to that between England and Scotland before the union of the Kingdoms in 1707. But the whole argument was clearly most unsatisfactory; what was decided by the judges there was simply that, if two distinct Kingdoms were held by one and the same person, then the subjects of the one, if born after the two Kingdoms became under the same sovereign, were not aliens in the other. So far from applying this doctrine to territories which had come into connexion with the Kingdom in any other way than Scotland, they distinctly declared the subjection of Ireland to the legislative supremacy of the English Parliament. The whole contention of the Assembly landed them in difficulties which they had to admit. 'If it be difficult for us to show why the King acquired a title to this country in his natural capacity or separate from his relation to his subjects which we confess, yet we conceive it will be equally difficult for your excellency to show how the body politic and nation of England acquired it.' The answer to the latter question was, indeed, obvious: the King in his actions was merely the executive instrument of the Kingdom of England, and this was precisely the reason why the King acquired a title to territory outside the realm at all. As the Assembly admitted, on their view there was an insoluble puzzle: how could the King as a natural person acquire title to lands which did not belong to him, were not in the realm, and were discovered and taken physical possession of by others? The answer, of course, was that these others being subjects of the King acquired them for the realm of which the King was the official head. Hutchinson in addition pressed the Assembly with the unanswerable argument that the Charter of the colony was granted by William and Mary, after they had been raised to the throne, and after they had by Act of Parliament taken a coronation oath to govern 'the people of the Kingdom and of the dominions thereunto belonging according to the statutes in Parliament agreed on, and the respective laws and customs of the same'. For the colony to beg a Charter from the King, and to assume that he could grant it free from the solemn oath he had taken, was manifestly absurd. Moreover, the statute of Anne continued in office existing officials for six months after the death of the sovereign, and under this provision Governor Dudley remained in office and was accepted by Massachusetts, showing that the colony fully accepted the binding power of Imperial Acts as it had done for more than seventy years together without complaints of grievance. Truth to tell, the new doctrine was essentially one produced by the stress of circumstance, the necessity of finding some legal basis of denying a supremacy which involved the right of taxation.

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[1] Extracts in Morison, *Sources*, pp. 104–15.

[2] 20 Hen. VI, f. 8

[3] 7 Rep. 22 *b*; 2 St. Tr. 648.

[4] Adams, *Pol. Ideas*, pp. 54 f., is too favourable to Wilson.

[5] H. Niles, *Principles and Acts of the Revolution*, pp. 79 ff.; McIlwain, *The Am. Rev.*, pp. 123–37.

John Adams in his *Novanglus*[1] attempted a fuller and more reasoned expression of the doctrine. He was faced by painful facts, namely the recent and most formal declarations of the Assembly of Massachusetts that it accepted the supremacy of the Imperial Parliament as a general rule, but denied that this supremacy included the right to tax. Moreover, there was the fundamental fact of the long series of Imperial Acts which had been accepted in practice. In this regard it is impossible to accept Adams's statement as in accord with facts. That the authority of Parliament was never generally acknowledged in America is certainly not borne out by his citation of protests from time to time. That no duties were imposed for revenue until 1764 is not in accord with facts. In 1707 the importation into the colonies of prize goods condemned in Admiralty Courts or otherwise was regulated by imposing the same rates of duty as if the goods had been imported into England and thence re-exported. Granted that the plantation duties of 1673 and the duties under the Molasses Act 1733 were intended to regulate trade, and not to impose a revenue, this could not be said of the Act of 1730 which allowed the direct importation of Carolina rice into Europe south of Cape Finisterre subject to payment of the same sum in Great Britain as if the rice had been taken to England and exported. Moreover, schemes taxing the colonies had been made during the period from 1700, showing that the doctrine that Parliament could not tax had no hold on colonial legal opinion. Adams had to deny that the Act against slitting-mills and tilt-hammers was ever enforced and that the Act as to hats was ever regarded. It is impossible to reconcile this with the express statement of so strong a partisan as Dickinson that there had been no objection to the right of Great Britain to forbid manufactures. Another most earnest opponent of Imperial supremacy, Stephen Hopkins, in 1765 stated that the colonies had carefully avoided every interdicted manufacture; this was the Governor of Rhode Island who in 1764[1] had startled American opinion by his famous dictum: 'What have the King and Parliament to do with making a law or laws to govern us by, any more than the Mohawks have?' The truth clearly is that the Acts repressing manufactures were observed much as those regarding trade; the colonists defied them all whenever it was conveniently possible, and the absence of any effective machinery for enforcing either in the period up to 1764 rendered evasion fairly easy. Adams had to admit that the Navigation Act and other Acts of Trade had been accepted, but he regarded this as a case of consent, which might be compared with that of a treaty between distinct states, which in his view the colonies and Great Britain were, as much as Scotland and England formerly, and Hanover and England then, were distinct states. The obvious difficulty here arose, which he ignored, that it was impossible for mere tacit acceptance to create law for Massachusetts or any colony. If an obligation was imposed by an Imperial Act, it is clear that either it applied *proprio vigore* to the colony or was law therein, or it had no application and had to be made law. That clearly could not take place without some formal act. Nor could that act be performed by a Court pronouncing the Act to apply, for that would have meant that Acts could be adopted by a law Court at its discretion and the power of legislation in vital matters would have passed to the Courts. It could, it is plain, only be done by the legislature, and Adams could not point to any such legislative action of Massachusetts, but had to rely on 'our implied consent by long usage and uninterrupted acquiescence'. But usage must have a beginning, and Adams did not face the question why usage started; the answer, of course, was simply that Acts of Parliament were applied because the legal opinion of the day admitted that they were binding and put them in force as much as other local

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[1] *Works*, iv. 1–177; extracts in Morison, *Sources*, pp. 125–36. He replied to D. Leonard (*Massachusettensis*, Boston, 1775).

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[1] In 1771 he sought as C.J. to prevent execution of the Privy Council decision in *Freebody* v. *Brenton*, A.P.C. vi. no. 871.

Acts were so put. It was idle also to pretend that the royal title did not depend on Parliamentary legislation posterior to the date of the Charter. Adams treats the matter as if the title were that of William and Mary, whereas the title of the Hanoverian house, which Adams unreservedly acknowledged, depended on the Act of Settlement 1701, in the framing of which and in the acceptance of which the colony had no share. Truth to tell, the former Massachusetts government was in a far stronger position than was Adams. It firmly to the last declared that it was not subject to Imperial legislation, and that even the Navigation Act was only brought into force by its express declaration. Adams rested on that fact as proving that the Navigation Act had been accepted by the colony, but he conveniently forgot that, because of this attitude, the Company had been destroyed by royal power, and that under the revived constitution no action was taken by the legislature to attempt to make Imperial legislation dependent on colonial acceptance, and that the House of Representatives as lately as 1758 and 1768 had expressed emphatically its acceptance of the supremacy of such legislation.[1] Nor was Jefferson in his *Summary View of the Rights of British America* in 1774 more successful in dealing with the legal theme. His view rested much more on conceptions of natural justice than on legal doctrines. He agreed with Adams in conceiving of the King as the sovereign or chief executive at the head of a number of quite distinct states or kingdoms. Expatriation was a natural right, enjoyed under the law of God and of nature, and those who expatriated themselves did not take with them subjection to the sovereignty of the land they left; the Saxons in England did not owe obedience to those that stayed in the continental home. The lands of America were acquired by the blood and treasure of their people, and it was of their own volition that they adopted for themselves the system of English law as a basis. Hence no power existed in the British Parliament to bind the colonies. Freedom of trade, moreover, was another natural right not to be fettered. The more telling part of his pamphlet was its attack in bitter terms on the legislation of George III's reign as indicating a deliberate and systematical plan of reducing Americans to slavery by the work of 'a body of men, foreign to our constitutions and unacknowledged by our laws'. The logical sequel of these views was the Declaration of Independence and the violent severing of the tie between the colonies and the mother country.

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[1] The oath of abjuration was remodelled for the dominions in 1766, 6 Geo. III, c. 53, s. 2, and not protested against.

It has usually been accepted that legally the right of the Imperial Parliament to bind the colonies could not be denied, with the very dubious exception at most of the issue of taxation. Prof. McIlwain,[1] however, has endeavoured to show that this current view is ill-founded and that of right the claim made in 1774 was in law substantially sound. This involves, of course, a very important assumption, namely that all the acts of acquiescence in Imperial legislation must be disregarded as evidence on the matter of law, and explained away by such considerations as that the Imperial Acts were laxly applied, and that colonial attention was at first not seriously directed towards the issue. The opposite view is clearly more natural and much more legitimate, namely that the Acts were acquiesced in because it was admitted that they were law, and that the opposition was in fact an afterthought when the colonies had realized that they could not logically deny the power to tax and admit the power to regulate trade. Nor can it be accepted that attention in the colonies was not attracted to these issues. Massachusetts had held her Charter from 1629 to 1684 to lose it ultimately essentially on that issue, and the idea of Imperial legislation to destroy all Charters was anxiously canvassed in the years 1701–2, 1705–6, 1715, and 1722 and elicited Dummer's famous *Defence*. No lawyer in America could have any excuse in these years for ignoring the vital issue, and there is no evidence that they did fail to consider the validity of the Imperial claim.

That they admitted it in practice was doubtless due to the weakness of the counter-argument as presented by Adams and in an improved form urged by Prof. McIlwain. It rests on nothing more satisfactory than a deduction drawn from the decision in *Calvin's* case[2] as to the allegiance of the *post nati*, children born in Scotland after the union of the Crowns in the person of James I, and this decision, as noted above, had no relevance to the case of territory acquired with royal sanction, or *post facto* approval by the English King, by his subjects in that capacity. On the contrary, the Court held most firmly that Ireland, which was in this position, was subject to the complete control of the English Parliament which might even impose taxes upon it. Nor was that any isolated view. It was acted upon unsparingly against the protests of the Irish Commons not merely by the Commonwealth—whose action might be deemed a usurpation—but by the authority of Charles I himself while still in power,[1] and that too without any suggestion of divergence of view on that point. It was, as has been mentioned, acted on by Charles II and with much frequency and weight by William III;[2] and, when once more the issue was raised in Ireland, it was reasserted in the most categorical terms by Parliament in 1719 and that declaration was submitted to by the Parliament of Ireland, which regained freedom only by two Acts of the Imperial Parliament in 1782 and 1783.[3] The latter Act is perhaps the more important in this regard, for it was passed at the wish of Flood and the majority of the Irish Commons and the Lords, because it had been found that, despite the repeal in the preceding year by the Imperial Parliament of the statute of 1719, so potent was by common law the Imperial supremacy that Acts carelessly passed subsequent to the measure of 1782 nevertheless by reference to Ireland bound in law that territory. It became, therefore, necessary formally to renounce all legislative power, so that Acts which mentioned Ireland must be reckoned to have no authority.

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[1] *The Am. Rev.*, pp. 1 ff. Cf. R. G. Adams, *Pol. Ideas of the Am. Rev.* (1922), who rather accepts the view that American politicians had sounder views of Imperial relations than British than stresses the legal accuracy of their views, a much more defensible claim.

[2] 7 Co. Rep. 1.

Adams endeavoured indeed to hold that Ireland was not a precise parallel to the colonies because it was a conquered territory, while they were acquired by settlement. It was obviously impossible to make anything valuable from this contention, because there was no reason why the power of Parliament should be deemed to extend to conquered lands rather than to settled lands; indeed, the presumption rather was the other way. Moreover, it was clear that New York and New Jersey were conquered in a far more obvious sense than Ireland was, and Holt C.J. had laid it down that even Virginia was to be deemed conquered, so that on the same theory the whole of the American colonies might have been ranked as conquered colonies, apart from the fact that it was far from generally agreed that Ireland was really conquered.

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[1] 16 Chas. I, c. 33.

[2] 12 Chas. II, c. 34; 15 Chas. II, c. 7; 22 & 23 Chas. II, c. 26; 1 Will. & Mar. c. 29; Sess. 2, c. 9; 3 Will. & Mar. c. 2 (acted on by the Irish Parliament of 1692); 11 & 12 Will. III, c. 2; 1 Anne, c. 21.

[3] 22 Geo. III, c. 53; 23 Geo. III, c. 28; *Parl. Hist.* xxiii. 16–48, 322–42, 730–57.

It is clear again that if the view, based on *Calvin's* case, by Adams was sound, and the colonies were in the position of Scotland as regards the King, then the recognized doctrine of colonial law was completely untenable. It was recognized that, on the conquest of a colony, its people became English subjects by the fact of conquest,[1] but in the case of Scotland the *ante nati*, those born before the union of the Crowns, remained aliens in England. Prof. McIlwain[2] is driven to admit that, on the view he supports, the Court in *Calvin's* case was wrong in not extending the doctrine to the *ante nati*, but this is unjust to the Court. It discerned clearly the specific differentia between Scotland and other dominions of the Crown, which even then existed in the shape of the Channel Islands, and it gave full effect to that position. How well the matter was understood in the Courts is shown by the case of *Craw* v. *Ramsay*.[3] It involved among other things the issue whether a Scotsman born before the Union of the Crowns was an alien in England so as to be unable to succeed to land, and the Court clearly was agreed that he could not. The issue on which there was an equal division of opinion was whether, if he was naturalized by an Irish Act of Parliament, he was so converted into an English subject as to be able to inherit: Vaughan C.J. and Tyrrell J. held that he was, the other two judges dissented. What is vital is that the position of Scotland and of the other territories was quite definitely discussed and laid down. A distinction was drawn between dominions belonging to the Crown of England such as Ireland, 'Wales, Gernsey, Jersey, Barwick, the English plantations, all which are dominions belonging to the realm of England, though not within the territorial dominion or realm of England, but follow it, and are a part of its royalty', and dominions of the King of England such as Scotland, which was a distinct Kingdom over which England had no legislative power, while it had such authority over the dominions of the Crown. It was indeed natural that this dictum should hold, and that it should only have occurred later that men thought that the King might create independent territories connected with England merely by his personality.

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[1] Chalmers, *Opinions*, ii. 364 ff.; Dicey, *Conflict of Laws* (ed. Keith, 1927), pp. 173 ff.

[2] Op. cit., p. 95, n. 1.

[3] *Vaughan's Reports*, 278 ff.

As seen in this case, no legal doubt existed that the Channel Islands were subject to the legislative supremacy of Parliament. Prof. McIlwain's doubt[1] as to this is based on a misunderstanding; whether the King in Council can legislate over the heads of the States of Jersey or Guernsey is a moot point which may never be decided,[2] but an Act of Parliament which mentions the islands applies *proprio vigore*, as was made absolutely clear in 1806[3] when the matter was raised, in accordance with the undoubted condition of the law.[4]

8. *The Limits of British Concession*

It is interesting to view, in conclusion, the suggestions of accommodation by a reconstruction of the Imperial Constitution which were contained in the royal instructions[5] of 12 April 1778 to Lord Howe and his colleagues as Commissioners under the Act 18 Geo. III, c. 13, to treat with the revolutionaries. The commissioners bore with them as assurances of good faith the news of the passing of the Act 18 Geo. III, c. 12, renouncing the imposition of any duty, tax or assessment in the North American and West Indian colonies save for the regulation of commerce, the net produce of such duties to be always paid for the use of the colony in which they were levied, and repealing the Act imposing the duty on tea. By 18 Geo. III, c. 11, the Act of 1774 modifying the constitution of Massachusetts was also repealed. The King was definitely ready to agree that no constitution should in future be altered by Parliament save on a petition from the Assembly of the colony concerned. Moreover, the Declaratory Act of 1766 might be replaced by a declaration agreed upon with the colonies as to the constitutional relations between the parts of the Empire. No standing army would be raised or kept within the colonies during peace save with their consent, provided that any mode could be settled for ensuring protection by provincial forces, and it appears that in the last resort it would have been left to the colonies to decide for themselves the extent of their defence. But all military commissions were to be in the royal name, and all forces and fortifications were to be under the command of those appointed by royal authority; this doubtless merely meant that the American officers should hold royal commissions and be sworn to loyalty to the King as in supreme command. No colonial vessels of war were to be maintained save under royal commission and employment. Governors and other judicial and high officials, hitherto appointed from the United Kingdom, might be elected, but must be commissioned under royal authority and the elections must be approved by the Crown. Burdensome offices could be suppressed. Judicial officers might hold during good behaviour and appeals be cheapened and expedited, while Admiralty jurisdiction might be restrained to causes maritime proper. The creation of a federal Assembly might be approved, and even a narrow representation in the Imperial Parliament if desired, but only as a great concession.

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[1] Op. cit., pp. 87–91. The author is thus unjust to Fisher's thesis (*The Struggle for Am. Indep.* i. 202 f.).

[2] *In the Matter of the States of Jersey* (1853), 9 Moo. P.C. 185; 8 St. Tr. (N.S.) 285; *In re Daniel,* ibid. 314.

[3] Order in Council, 7 May 1806. See 7 & 8 Will. III, c. 22, s. 8; Duncan, *History of Guernsey*, p. 427.

[4] Inst. c. 70, pp. 286 f.

[5] Morison, *Sources,* pp. 186–203.

The vital commercial issue was approached hesitatingly. If a contribution towards the cost of defence could be secured, or (presumably) local forces accepted the obligation, then laws of revenue could be left to officers appointed by the Assemblies to administer without Imperial intervention. But the principle of a monopoly of American commerce was not to be surrendered. If it was impossible to prevent direct trade with other parts of Europe, and in fact export to Europe of many commodities was permitted under the former régime, still duties should be charged on European imports, and also on American exports sent direct to Europe. The legislation for regulation of trade must be Imperial, but on the new principle of autonomy should be based on formal representations from the colonies. Aid in the raising by the colonies of sums necessary for defence would be afforded by cession of the royal claims to port dues, escheats, forfeited grants of lands, quit-rents, and postage charges. Though land revenue yielded little when it was to be accounted for in London, it would be an important source of revenue under vigilant local collection. As regards paper money it was impossible to agree for the moment to permit it to be tender for private obligations—obviously a reserve necessary in mercantile interests—but benevolent support and the duties on American commerce would be afforded to any plan to redeem the recent enormous issues under revolutionary conditions, and, thereafter, the legislatures could assume full control, economic conditions sufficing to bring their action into harmony with sound principles of finance.

These proposals[1] were naturally too late to secure peace, but it is interesting to note that they would in effect have conceded a complete cessation of intervention in all local affairs, executive and legislative, civil and military. The appeal to the Privy Council would probably have died an early death. Commercial control would have rested on joint agreement in form, and doubtless in reality, and there would have remained unsettled only the question of foreign policy, in which, as affecting Europe, America, as Washington was to insist, had no direct concern. It must be admitted that the mere offer of such terms is the severest condemnation of the attitude of the Imperial government in 1774. It proves beyond doubt that the measures of that year were based on no fundamental principle essential to the Empire. The parallel, however, with British policy towards Ireland in 1916–22 is too close to permit of any wholesale censure of eighteenth-century politicians, who, like their successors of the present day, were too immersed in the daily conduct of Imperial relations to be capable of taking long views and of surveying Imperial problems in a spirit of calm detachment.

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[1] Compare the Report of the Conference on Dominion Legislation and Merchant Shipping Legislation, 1929; Parl. Pap., Cmd. 3479; Keith, *The Sovereignty of the British Dominions* (1929).

XV. THE NEW COLONIAL POLICY

1. *The Quebec Act*

THE regular system of colonial constitution consecrated by the revolution rested on the basis of the Assembly as an essential foundation for law and taxation. It had become obvious, however, that Assemblies were usurping power, and it is a striking proof of the tenacity of tradition that the royal proclamation of 7 October 1763 assured the four new colonies, Grenada, the two Floridas, and Canada, the enjoyment of the traditional form. In all cases the proclamation was followed up by the issue of the necessary commissions, empowering the calling of an Assembly in due course. In the meantime, in the case of Quebec Murray was to have a Council of twelve members, four officials and eight nominee, who were given legislative authority to make ordinances for the peace, order, and good government of the province, but not so as to affect the life, limb, or liberty of the subject, or impose duties or taxes.[1] This was the only vital departure from the normal commission, but, in fact, the military forces at the disposal of the Governor-in-Chief placed him in a completely different position from any colonial Governor on the continent, and revenue was provided, inadequately by the retention of existing dues, but fully by Imperial grants. The Council and the judges and other officers were necessarily Protestants in view of the oaths which they had to take, and the elected Assembly could only consist of Protestants as a result of the same consideration, but it was not suggested that the freeholders, who were to elect, were to be confined to Protestants. A vital clause, also promised by the proclamation of 1763, provided for the erection of Courts in which English law was to be applied.

The normal development of this constitution would have been, as in the other three colonies, the summoning of an Assembly, but further reflection revealed the disparity between the case of Quebec and the other colonies. A solid mass of perhaps 60,000 French Roman Catholics confronted not more than 600 English, mainly very recent arrivals, for French Canada had been hostile to Protestants and English. Moreover, French policy had absolutely denied rights of self-government, and had habituated the people to obedience to orders from above, so that political capacity for elections and membership of an Assembly, even if that had been legal, was lacking. But the proposal suddenly to change the law[1] of the province specially moved Mansfield to wrath and to demand the remedying of what Hillsborough, who was in theory responsible for the proclamation of 1763, declared was a mere error, the intention of destroying the fabric of French private law. Mansfield repeated *ad nauseam* the doctrine that laws of conquered countries should normally remain, until altered for good cause, and he was reinforced by the British officers who disliked the American-English immigrants, and above all distrusted them as potential revolutionaries. The dominant influence in the settlement of the political future of Quebec was Carleton, and the evidence is clear that he was motived by the certainty of a revolt in the American colonies, in which event he pictured the use of a strong force of loyal French Canadians to coerce the revolting colonies. There is no evidence that Carleton would have had the military capacity to use such a force if one had been available, and his suggestion of the probability of the existence of such a force was completely belied by experience. So far, therefore, as the Quebec Act[2] was based on this sordid conception, it was obtained improperly, and it is not surprising that the measure was supported with this sinister purpose by North, and by the Law Officers, Wedderburn and Thurlow, who in 1772 actually argued as if the proclamation of 1763 had not been an express invitation to English settlers to resort to Canada on the promise of an Assembly and English law. It might be necessary to revoke a solemn promise, but it should certainly not have been done without candid admission of the necessity. Nor was there the slightest effort made in the Act passed in 1774 to soften the reversal of the policy of 1763. The Board of Trade in 1769[3] endeavoured to put forward a scheme which would have produced an Assembly of fourteen Protestants and thirteen Roman Catholics; and the Judge Advocate Marriott,[1] when examined before Parliament, showed his strong reluctance to approve a scheme for the endowment of the Roman Catholic religion and the extinction of any independent legislature. But not even on the question of the desirability of introducing a modified form of law, urged by Masères and Marriott alike, would the government make any concession. Of the accusations of the Declaration of Independence[2] the most just is that which ascribes to the Crown a plan 'for abolishing the free system of English laws in a neighbouring province, establishing therein an arbitrary government and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies'. If the intentions of the framers of the Act failed to have the evil effects ascribed to them, it was because their deplorable incapacity rendered them incapable of carrying out their intentions.

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[1] Shortt and Doughty, *Doc. rel. to Const. Hist. of Canada*, 1759–91, pp. 174 ff., 182 ff. The power to legislate with the Council was given in the Instructions only, to emphasize its abnormality; A.P.C. iv. 575. Grenada and West Florida had Assemblies in 1765 and 1766.

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[1] Roman Catholics were admitted by Ordinances of 1764 and 1766 to juries and to practise in the Courts; A.P.C. iv. 695–8.

[2] 14 Geo. III, c. 83.

[3] Shortt and Doughty, pp. 383 f.

The Quebec Act, therefore, was designed to conciliate the French population by a restoration of their laws, save the criminal law which for its greater certainty and lenity—compared to the theory of the old French law—was wisely retained, by the endowment of their religion, but to subject them to an absolute government of the paternal type to which they were wont. It was forgotten that the English invaders could not create the bond of loyalty to the King which after all kept the habitant loyal under the seigneurial system. The way to religious liberty had been paved by the decision of the government in 1765–6, on the advice of the Law Officers, that the introduction of English law had not brought with it the English penal laws. It had, of course, introduced the royal supremacy over the Church laid down by the Act of Elizabeth, but, notwithstanding this difficulty, the ministry[3] in 1766 succeeded in allowing a Bishop to be privately consecrated at Suresnes, and to return to Canada as Superintendent of the Roman Catholic Church, theoretically to exercise his power under the Governor, but virtually to continue the established system of control, relieved from the restrictions which French policy had placed on the freedom of the Bishop in Canada. The Act now conferred on Canadians the right to exercise the Roman Catholic religion, subject to the royal supremacy, and provided a form of oath which could be taken by any Roman Catholic without demur and opened the way to legislative or official functions. Permission was given to the Crown to make provision from tithes paid by Protestants for the support of the Protestant religion, but Roman Catholics were placed under legal obligation to pay the usual dues to their priests, thus countering a growing indisposition on the part of the habitants to continue rendering these dues, and permanently securing the endowment of the Roman Catholic Church in Quebec.

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[1] Cavendish, *Debates on Quebec Act* (1839), pp. 163–76.

[2] A. Hamilton, *Works*, i. 181–96.

[3] A.P.C. vi. 396–9; Shortt and Doughty, pp. 389 f.

The existing French law was replaced in all save criminal matters, thus perpetuating a system of feudal tenure,[1] which was an unmitigated nuisance and which, after years of patching, was got rid of by the will of the French Canadians in 1854, by which time it had doubtless served the purpose of discouraging English settlement in Quebec to a marked degree. It was not, however, in the ultimate issue, the fault of the ministry that fastened on French Canada a difference between it and the rest of the Dominion in regard to the law of contracts, mercantile and other, and of torts, and denied it for years to come Habeas Corpus and jury trials in civil matters. All these concessions the ministry had decided to make by January 1775, but Carleton, whose conduct in this as in other matters shows that he shared the lax political morality of the day, did not obey his instructions,[2] and the whole system of French law was bodily enforced. The merchants of Quebec, of course, belonged to that class most obnoxious to Carleton, the American conscious of his rights at law and suspected of disloyalty. It was, doubtless, hoped by restoring the seigneurial régime to secure the loyalty of the leaders of the people, but the net result was to alienate the peasants, who in part shared the rebellion, and in much larger measure declined absolutely to turn out for service, when the old law of military obligation was sought to be put in operation.

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[1] Grants on this basis were ordered by Instruction in 1771; A.P.C. v. 293, 361.

[2] Smith, *C.H.R.* i. 166–86. For Carleton's wrongful dismissal of Livius C.J., for his effort to induce him to obey the royal instructions, see A.P.C. v. 463 ff.

The government of the province was conferred on a Governor with the aid of a Council[1] of not less than seventeen nor more than twenty-three members, to whom was given the power of legislation, but not of imposing any taxes or duties save that it might authorize the inhabitants of any town or district to levy local rates. No ordinance affecting religion or inflicting a greater punishment than a fine or three months' imprisonment was to be in force without royal approval. All enactments were to be sent home within six months and might be disallowed. The necessary revenue was supplied by an independent measure, the Quebec Revenue Act,[2] which imposed dues on spirits and molasses and continued the French territorial and casual revenues. The Government was thus placed in a position of complete superiority: it had a military force, an independent revenue, an obedient legislature, and the whole of the resources of the ancient French law to enforce obedience, nor was it known in 1774, when Burke, Fox, and Chatham denounced the scheme, that this imposing apparatus was to fail decisively when the moment for it to function arrived.

The boundary settlement embodied in the Act was peculiarly unfair. The boundaries of the French province with its French law and Roman Catholic religion were extended to include the Ohio and Mississippi territory.[3] It was admittedly intended to bar New York or Pennsylvania from further expansion, and to give the French Canadians the control of the Indian trade, thus settling in favour of them the struggle which before 1763 the British had so energetically maintained to divert to the British colonies the fur trade. To continue the territory under military rule until civil government proved possible, or to divide it between the other colonies, would have been far wiser steps than to hand over the area to a Roman Catholic colony to which Englishmen were not welcomed, and in which free institutions were forbidden. A most unfortunate clause in the Revenue Act added further injury by requiring all imports from outside to enter by the St. Lawrence or at St. John's, a plan which would have destroyed New York trade with the Indian area in favour of Quebec. That the error[1] was inadvertent is incredible, for its purpose was clearly in harmony with the intention to ruin the trade of the American colonies for the sake of French Canada.

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[1] Carleton's illegal creation of a Privy Council of five members was censured in 1779 by the Board of Trade (A.P.C. v. 468 ff.).

[2] 14 Geo. III, c. 88. For collection of the former revenue see A.P.C. iv. 725 f. (1765).

[3] As late as 1773 the Board favoured the establishment of a colony of Vandalia with a representative constitution; A.P.C. vi. 541–3, 655–7; ch. xii, § 8.

2. *The Province of Senegambia*

The campaign against monopolies under William III ended the monopoly of the Royal African Company, and in 1698 the slight compensation was given of 10 per cent. duty on exports and imports to the coast. This ended in fourteen years, but from 1730 to 1747 Parliament made annual grants for the maintenance of the forts. It then declined to continue the system and in 1750 a completely new plan was adopted. Freedom of trade to Africa was proclaimed, and a Company of Merchants trading to Africa was set up, open to all traders, to which were transferred the forts of the old Company in 1752.[2] The new Company was forbidden as such to trade; by payment of forty shillings membership was obtained, and the members in three groups at London, Bristol, and Liverpool elected nine as a Committee to which the control of the Company was given. Their function was to control and manage the forts and settlements on the coast, by means of funds annually voted by Parliament. They worked under the supervision of the Exchequer, the Board of Trade, and the Admiralty, and the criticism of Parliament, which investigated on several occasions their work. But their position was essentially that of managers of trade posts, not of controllers of sovereign authority. The posts were held on a tenure from native chiefs, and no civil or military control was exercised over the free traders. The Committee had power to regulate the government of the forts and of their officers. They created a government by Governor and Council, which controlled the several forts, a strict military discipline being maintained in the small military force which it raised and controlled. For civil government even of the trade-post employees or servants, no effective legal organization appears to have been thought necessary, though clearly it could have been organized under the legal powers given by the Act of 1750. No effort was made by the Committee to extend British influence inland; its purpose was essentially to manage a trade on the coast, not to establish or maintain British sovereignty.

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[1] Remedied by 15 Geo. III, c. 40.

[2] 23 Geo. II, c. 31. For 9 & 10 Will. III, c. 26, see Stock, ii. 216 ff., 230 ff., 244 f.

A remarkable change resulted from the capture by Pitt's direction of St. Louis and Goree in 1758, as a stroke against the French monopoly of the gum trade. Pitt's incompetent successors sacrificed Goree at the peace, and thereby paved the way for the loss of most of the new acquisitions by the treaty of 1783. The future of the new acquisitions was for the moment disposed of by an Act of 1764,[1] which gave the Committee of African Merchants the same authority as it exercised in the other forts, but in 1765[2] the Board of Trade, which had had at last time to investigate the whole matter, reversed this policy. The circumstances, indeed, of the cases were entirely unlike, for in Senegambia there was a complex native question, an intensive inland trade, unlike the seaboard traffic of the Gold Coast, and an acute Anglo-French rivalry quite unlike the Anglo-Dutch contests on the Gold Coast. It was recognized that the forts under the Company were inadequate for defence and that no efforts were being made to extend British influence, though the Board did not determine whether the fault was that of the Company or due to the lack of means or otherwise. The new area, however, by Act of 1765 was vested in the Crown for the more effectual protection and encouragement of the trade to Africa, leaving to the Company of Merchants its control on the other parts of the coast, and by another Act gum was subjected to a duty.

The constitution for the new territory was laid down in a novel manner, for it was outlined in an Order in Council of 1 November 1765, and the outline was filled up by the commission and instructions to the Governor. The territory between Cape Rouge and Cape Blanco was created the province of Senegambia under the direct control of the Crown. But the type of government, though it had a Parliamentary foundation, still clung to the American model so far as the circumstances admitted. The Governor was to have like powers to Governors in American colonies in matters of administration, and to be assisted by a Council comprising the Chief Justice, commandant of troops, superintendent of trade, and secretary, with nine additional members appointed as in the American colonies. He and the Council were to have legislative power, subject to the right to disallow and the rule of non-repugnancy to the law of England. Justice in criminal and civil matters alike was vested in a Chief Justice with a right of appeal in common law and equity where the cause exceeded £20 in value to the Governor and Council. Justices of the peace were to be set up with like powers to those of English justices. The Governor was to appoint a sheriff and the justices constables as in England. The military establishment was to be three companies of foot, but the Governor was to be superior in whatever concerned the military as well as the civil establishments. The English Church was to be established both in principle and practice by sending out two ministers, but there was to be liberty of conscience, subject to the exclusion of any foreign ecclesiastical jurisdiction. The new territory fell under the Navigation laws, and the American model was chiefly departed from in that the Governor was not to make land grants save under special direction from the Crown. The Imperial Parliament, which would pay nothing normally for American civil government, made large grants annually, which the Governor exceeded, and a new type of agent in London appears, charged especially with the financial business of receiving and expending funds under instructions from the Treasury. A like appointment had been made for Quebec.

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[1] 4 Geo. III, c. 20.

[2] 5 Geo. III, c. 44.

In the case of Senegambia recourse to Parliament was necessitated by the grant of control to the Company of Merchants by the Act of 1764, which could be varied only by like authority. In that of Quebec it was compelled by the promise of an Assembly under the doctrine of *Campbell* v. *Hall*.[1] In either case, while the forms of the normal American colonial government were largely adopted, they were deprived of all reality by the omission of the fundamental element of an Assembly. In Canada the existence of a large European population and of public opinion rendered this departure from tradition a mere temporary breach in the continuity of the revolution settlement with its insistence on Assemblies, and, though delayed by war conditions, representative institutions were conferred on Canada by the Act of 1791.[2] In Senegambia, on the other hand, the absence of any civilized population rendered control of the administration by the Crown really impossible. Charles O'Hara, the first Governor, was removed from office in 1766 on the score that, having found difficulty in executing his instructions, he had failed to apply for orders. In fact he had ignored his Council, and had made no efforts to call the judicial system into operation. Macnamara, who, as Lieutenant-Governor, administered after his recall, fell equally into disgrace and was superseded. But his successor's effort to secure the operation of the judicial system was a failure in 1778, though the establishment of the Chief Justice's Court enabled ineffective judicial proceedings to be commenced against Macnamara.[1] The war gave the needed excuse for abandoning in 1781 any pretence at civil government; in 1783[2] the treaty of peace left only the Gambia to the Crown, and an Act in that year restored the control of the Company of Merchants, thus terminating ingloriously the life of the first Crown Colony in West Africa.

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[1] 20 St. Tr. 239; see ch.i, § 2.

[2] 31 Geo. III, c. 31.

[1] An action was brought in England: *Wall* v. *Macnamara* (1779), cited 1 Term. Rep. 536; 99 E.R. 1239.

[2] 23 Geo. III, c. 65.

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